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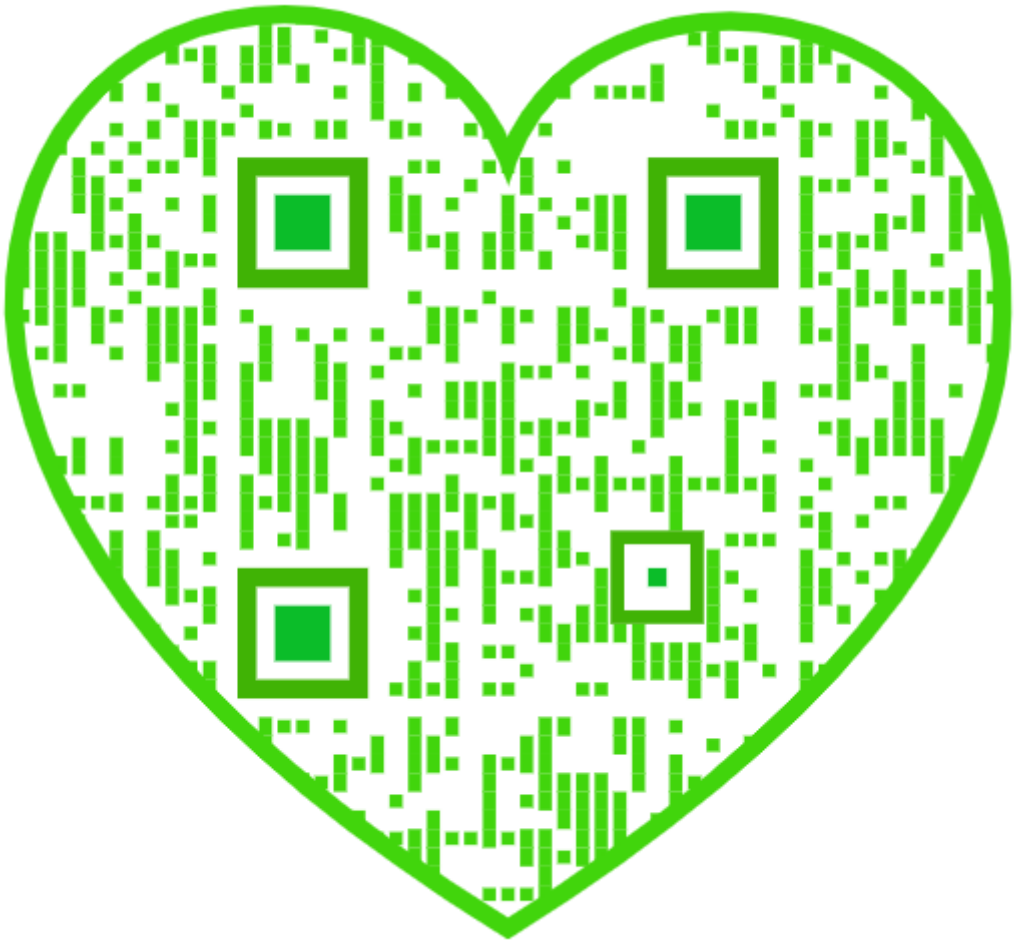

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Judicial Spanking

We note with more than a mere passing interest that the presiding judge of a New York juvenile court recently offered, with the parent's consent, to administer an old-fashioned spanking to an incorrigible youngster that had been brought before him. A good idea. Why not a legislative prohibition against all corporal punishment in the home, coupled with a provision that such punishment shall, in proper cases, be administered to delinquent youths by the juvenile court judges? Such an innovation has certain advantages that should not be overlooked. The punishment would then fall wholly where it belongs, upon the unruly infant, and not equally, or to an even greater degree, upon the parent. For we have it upon the unqualified statements of parents that the whipping they administer hurts them more than it hurts their erring offspring. Again, it frequently happens that an irate father will overdo the whipping business. Not so the chastising arm of the law. The punishment will be nicely adjusted to the particular offense and to the character of the delinquent, and will be administered by the court with that calm detachment from all personal feeling which characterizes the imposition of legal penalties. All this, of course, is upon the assumption that we are to have corporal punishment at all. And it does seem as if the only recourse that is quite adequate to meet the situation in many cases is a "good licking" of the wood-shed variety.

Gowns for Lawyers.

Ex-President Taft, in a recent lecture before the Boston University law school, said that lawyers in this country ought to wear robes and wigs, as do lawyers in England, so as to command more respect. There is something to be said in favor of the English custom, at least so far as the robes are concerned. Robes would not only be an extraneous aid in increasing popular respect for lawyers, but they would have a potent subjective influence upon the lawyers themselves. There is a psychology in clothes. We are subtly and unconsciously affected by our bodily investments. The apparel, 'tis true, doth oft proclaim the man, but it as often helps to make him. It would be futile, for example, for the actor to attempt a merger of his identity in his part without the aid of an adequate make-up. The Protestant clergy are coming to find more inspiration in the clerical gown than in the black frock coat, and are relegating the latter to the pews. The gowns of the judges in the higher courts not only give an air of dignity and impressiveness to the judges, but are, we doubt not, of no inconsiderable aid to them in making their judicial pronouncements. We should look, therefore, for a refining and elevating effect upon the attorney at the bar from the adoption of the professional gown. A greater courtesy and deference would mark his attitude toward the court, and he would be less unmindful of the amenities due to opposing counsel. The sack coat makes the lawyer a legal partisan actuated solely by the not always equitable interests of his clients. The gown would restore him to his ancient dignity as an arm of the court, an efficient aid in the administration of justice. By all means let us have the gown. As to the wig, that is another question. Plausible arguments in its favor, however, could doubtless be adduced by the bald-headed members of the profession.

Guilty but Insane.

A committee of the New York Bar Association has recommended the enactment of a law giving juries the right to pronounce prisoners accused of murder "guilty but insane." Persons so convicted would be confined the prescribed length of time in an asylum for the criminal insane instead of in one of the regular prisons of the state. This recommendation is undoubtedly made in view of the revelations of the Thaw case. The committee says:

"No injustice would be done to a sane man who, after committing murder, has, by the aid of deceived or purchased experts and dishonest counsel, persuaded a jury that he was insane. He cannot complain if the law takes him at his word and sends him to keep company with those who are really insane."

This may be true. But what about the person who is really insane? The proposal seems to assume that the plea of insanity is never made in good faith. It is no doubt true that in many cases the ends of justice have been defeated by sham pleas of insanity. But on the other hand it cannot be gainsaid that in many cases the plea of insanity has been properly interposed, and the law should not take the chance of punishing the innocent in order that the guilty may not escape.

In the larger sense, however, the verdict of "guilty but insane" might properly be pronounced in the great majority of criminal cases. It is coming to be more clearly seen that the criminal is a defective, and that corrective rather than punitive measures should be applied in the treatment of him. It is hardly necessary to say that our state prisons have little, if any alleviative or reformatory influence upon their hapless inmates. The

word "penitentiary," as applied to the average prison, is a glaring misnomer, for the convict emerges therefrom in anything but a penitent frame of mind. He usually comes out possessed of seven devils where he went in with one. It has been well said that imprisonment is as irrevocable as death. Our penal system, in short, is a colossal failure. And it is so largely because our attitude toward the criminal is mediæval. We are still obsessed by the compensatory idea of punishment. The spirit of the *lex talionis* survives although the law itself is obsolete. Happily, however, the leaven of a more enlightened penology is working upon the collective conscience to quicken it into a realization that right and justice and social safety lie in making reclamation and not retaliation the predominant aim of our penal system. Note these weighty words of Justice Brown of the Minnesota supreme court, in discussing the modern conception of punishment (*State* v. *Wolfer,* 119 Minn. 368): "The office of a judicial sentence for crime cannot, under this conception of 'punishment,' be altogether the same as when society demanded payment, complete and more or less in kind, for infractions of its laws. No longer is proportionate punishment to be meted out to the criminal, measure for measure; but the unfortunate offender is to be committed to the charge of the officers of the state, as a sort of penitential ward, to be restrained so far as necessary to protect the public from recurrent manifestations of his criminal tendencies, with the incidental warning to others who may be criminally inclined or tempted, but, if possible, to be reformed, cured of his criminality, and finally released, a normal man, and a rehabilitated citizen."

American Academy of Jurisprudence.

For the purpose of bringing about a comprehensive and concise restatement of the existing law, both federal and state, a number of prominent lawyers, statesmen and jurists held a meeting recently in New York city at which the formation was effected of the American Academy of Jurisprudence. William Howard Taft was elected president, and Alton B. Parker first vice-president, of the new organization. The other officers chosen were Frederick W. Lehman, second vice-president; James De Witt Andrews, secretary, and Waldo G. Morse, treasurer. Such men as Elihu Root, Henry Wade Rogers, F. R. Coudert, James Brown Scott, Francis Rawle and Henry St. George Tucker have also signed the membership roll of the Academy. It has been decided to make the Academy a voluntary organization which will be incorporated by a special act of Congress. The funds for the work will arise through membership fees, although it is probable that the federal and state legislative bodies will be asked to lend financial assistance. The motives which prompted the formation of the Academy were outlined in an address by Frederick W. Lehman, of St. Louis, late president of the American Bar Association, who said:

"If an American wishes to know the laws of his country he must turn to several hundred volumes of statutes, several thousand volumes of reports of adjudicated cases and almost as many more volumes of text books. The task proves so confusing that it means hours of work before the desired information can be obtained. It is the purpose of the American Academy of Jurisprudence to systematize this great mass of legal matter, place it in concise and plain language, and in short put it in such form that the greater portion of the work now necessary in looking up a legal question will be obviated."

"The natural tendency of laws is toward confusion, contradiction and uncertainty," declared James De Witt Andrews, who was for many years chairman of the Committee on Classification of Law of the American Bar Association. "The scientific check against the tendency is everywhere recognized to be the systematic statement of the law, bringing into the foreground the great fundamental institutions and principles around which the detail rules are grouped. This work can only be carried out by an organization such as is embraced in the American Academy of Jurisprudence."

We do not understand that it is the purpose of this society to attempt a complete codification of the whole body of the law. The formation of the society may, however, prove to be the entering wedge to that end. Even if the Academy confines itself to a restatement and systematization of all the statute law, it will have its work cut out for it, as it has been roughly estimated that there are 58,000 laws upon our statute books. To untangle and coördinate this mass of legislation will be a sufficiently stupendous task to exercise to the full the high legal talent that has been enlisted in the work.

The Bleached Flour Decision.

The decision of the United States Supreme Court in the "bleached flour case" has met with considerable adverse criticism from the daily press. The *New York American,* for example, thinks that the decision practically nullifies the Pure Food law. "The decision," says the *American,* "is another one of those which of late have attracted attention because of their effect in nullifying carefully matured legislation. Professing to uphold the Pure Food law, it proceeds to destroy its effectiveness by declaring that the presence of poisonous substances in food is not proof of the violation of the law, but that the Government must prove, in trying a case of this sort, that the substances were present in quantities sufficient to cause injury to the health of the consumer. The Supreme Court tells us that flour may be reasonably poisonous without coming under the ban of the Pure Food law. But how shall it be determined when the limit of reason in the administration of poisons in guise of food is reached? Are the millers and bleachers of flour to go on adding poisonous substances until they have actually killed some one? Is not it possible that an amount of poison that would be harmless to one of strong physique might kill a weakling? Was the Pure Food law passed for the protection of the strong alone? Decisions of this sort make the people impatient. They raise, and justifiably, the cry for the recall of judges. It is a flat negation of the whole theory of popular government, that after a proposed law has been agitated for years, discussed in the press and on the platform, debated in all its phases by Congress, passed and signed by the President, a court which took no part in the discussion and which is wholly ignorant of the merits of the case should set aside all the fruit of this long agitation by construing the law in a way its makers never intended. Supreme Court decisions are more and more taking on

this character, and with each one the dissatisfaction of the public is more openly expressed. The passage of a law has ceased to mean anything. If an attorney-general objects to it, he declines to enforce it. If the Supreme Court disapproves it, the law is nullified. The Pure Food law, which now stands as a dead letter, is only the latest and most irritating instance of this tendency to override the lawmaking body of the nation."

With the spirit of this criticism we are quite in accord. The popular will, as expressed in matured legislation, has too frequently been balked by forcing such legislation to run the gauntlet of an unsympathetic judicial scrutiny. But in this particular case the Supreme Court does not appear to us to have gone wide of a logical decision, under the statute, nor does the decision seem to us to justify the belief that the Pure Food law has been nullified. The Food and Drugs Act prohibits the use of only those ingredients "which may render such article injurious to health." Now, it was not shown in the particular case that what is done to flour in bleaching it makes it injurious to human health, although in the bleaching process a substance is used which in large quantities is harmful. The mere presence, however, of a minute trace of a substance known to be harmful in larger doses should not be considered a violation of the Food and Drugs Act, since many substances commonly regarded as poisonous are found in minute quantities in our foods, and, for aught we know, may be essential to the well being of the human organism. It seems to us that in this case the head and front of the Supreme Court's offending extended no further than in following the rule of reason upon the facts.

"White Person" as Used in the Naturalization Law.

THE United States District Court at Charleston recently refused naturalization papers to a native born Syrian, on the ground that he was not a "free white person" within the meaning of the act of Congress bearing on that qualification for citizenship. We have before us only the newspaper report of the case, which leaves us uninformed as to whether the court considered the previous federal decisions upon the subject. United States courts in Georgia, Massachusetts and Oregon have squarely held that a Syrian is a "white person" within the meaning of the federal act, and therefore entitled to naturalization. See *In re Najour,* 174 Fed. 735; *In re Mudarri,* 176 Fed. 465; *In re Ellis,* 179 Fed. 1002. It does not seem likely that the federal court at Charleston overlooked these cases. It probably refused to follow them, which, of course, it could properly do, being a court of co-ordinate jurisdiction with the courts that decided the cases. In deciding, however, that a Syrian is not a "white person" within the meaning of the naturalization act the South Carolina court not only directly opposes the cases above cited, but gives a narrower construction to the word "white" than has generally been given by the courts. They have not usually held the color of the skin as determinative, but have made "white person" inclusive of all members of the Caucasian race. See *In re Ah Yup.* 5 Sawy. 155, Fed. Cas. No. 104; *In re Camille,* 6 Fed. 256; *U. S.* v. *Balsara,* 180 Fed. 694, and the cases *supra.* "Although the term 'free white person,'" says the court in the case of *In re Najour,* 174 Fed. 735, in admitting a Syrian to naturalization, "is used in the statutes (Rev. St. § 2169 [U. S. Comp. St. 1901, p. 1333]), this expression, I think, refers to race, rather than to color, and fair or dark complexion should not be allowed to control, provided the person seeking naturalization comes within the classification of the white or Caucasian race, and I consider the Syrians as belonging to what we recognize, and what the world recognizes, as the white race. The applicant comes from Mt. Lebanon, near Beirut. He is not particularly dark, and has none of the characteristics or appearance of the Mongolian race, but, so far as I can see and judge, has the appearance and characteristics of the Caucasian race."

The courts, federal and state, have frequently been called upon to declare the meaning of the term "white persons" as used in the naturalization act. In the case of *In re Kanakanian,* 6 Utah 259, a native of the Hawaiian Islands was held not eligible to naturalization. This, of course, was before the annexation of the Islands. In the case of *In re Po,* 7 Misc. 471, 28 N. Y. S. 383, a native of British Burmah was denied naturalization. Chinese were expressly denied the right to naturalization by the act of Congress of May 6, 1882. But irrespective of this act it has been held that a Mongolian is not a "white person" within the meaning of the term as used in the naturalization laws. *In re Ah Yup,* 5 Sawy. 155, Cas. No. 104. And a certificate of naturalization obtained by a native of China is void on its face. *In re Gee Hop,* 71 Fed. 274. Japanese have also been held ineligible to naturalization. *In re Saito,* 62 Fed. 126; *In re Yamashita,* 30 Wash. 254. As has also an Indian who is a native of British Columbia. *In re Burton,* 1 Alaska 111. On the other hand a Parsee has been held to be a "white person," and therefore eligible to naturalization. *U. S.* v. *Balsara,* 180 Fed. 694. Armenians have likewise been held eligible. *In re Halladjian,* 174 Fed. 854. And in the case of *In re Rodriguez,* 81 Fed. 337, it was said that whatever may be the status of a native of Mexico viewed solely from the standpoint of the ethnologist, he is embraced within the spirit of our naturalization laws.

It will be seen that there is more or less ambiguity latent in the term "white person" as used in our naturalization law. There is enough judicial uncertainty, at any rate, as to the precise connotation of the term, to justify Congress in giving to the word "white" a more definite signification, and thus fixing the policy of the government with regard to our alien citizenship.

BLOODHOUND EVIDENCE.

ON the theory that the scent and instinct of bloodhounds did not afford data reliable enough to be regarded as evidence, the supreme court of Illinois recently reversed a judgment of conviction for murder. The defendant, it appears, was charged with having killed his father, mother, sister, and a school teacher boarding in the family. On the night of the alleged crime the house was burned, and the mutilated bodies were dug out of the ruins. The accused, then less than twenty-one years old, was known to be heavily in debt and was supposed to have killed the rest of the family for the

insurance. There were no witnesses, but it was shown at the trial that bloodhounds trained to track human beings had been put on the trail at the scene of the crime, and had traced the young man to his lodging. The trial court admitted this evidence, and on it the verdict of guilty was found.

The adjudged cases upon the admissibility of bloodhound evidence are few, but appear to be quite uniform in holding such evidence admissible under proper conditions. See *Richardson* v. *State,* 145 Ala. 46, 41 So. 82; *Pedigo* v. *Com.,* 103 Ky. 41, 19 Ky. L. Rep. 1723, 44 S. W. 143, 82 Am. St. Rep. 566, 42 L. R. A. 432; *Denham* v. *Com.,* 119 Ky. 508, 27 Ky. L. Rep. 171, 84 S. W. 538; *Baum* v. *State,* 27 Ohio Cir. Ct. Rep. 569; *Parker* v. *State,* 46 Tex. Crim. 461, 3 Ann. Cas. 893, 80 S. W. 1008, 108 Am. St. Rep. 1021.

But in order that such testimony be admissible there must be preliminary proof of such character as to show that reliance may reasonably be placed upon the accuracy of the trailing attempted to be proved. *Davis* v. *State,* 46 Fla. 137, 35 So. 76. In *Pedigo* v. *Com., supra,* which is a leading case upon the subject, the court in stating the conditions under which this sort of evidence may properly be admitted, said: "We think it may be safely laid down that, in order to make such testimony competent, even when it is shown that the dog is of pure blood and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him. When so indicated, testimony as to trailing by a bloodhound may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the crime of which he is accused. When not so indicated, the trial court should exclude the entire testimony in that regard from the jury. It is well known that the exercise of a mysterious power not possessed by human beings begets in the minds of many people a superstitious awe, like that inspired by the bleeding of a corpse at the touch of the supposed murderer, and that they see in such an exhibition a direct interposition of divine providence in aid of human justice. The very name by which the animal is called has a direct tendency to enhance the impressiveness of the performance, and it would be dangerous in the extreme to permit the introduction of such testimony in a criminal case under conditions which did not fully justify its consideration as a circumstance tending to connect the accused with the crime."

In a dissenting opinion in the case from which we have just quoted, Guffy, J., says that although the majority opinion so restricts the proof in question and requires so many conditions precedent that if the opinion should be strictly adhered to no great injustice would very often result from evidence admitted under the ruling, the rule of evidence announced, if not in violation of the letter of the constitution, is, in his opinion, manifestly in violation of its spirit. The use of bloodhounds, he says, was, perhaps, necessary to uphold efficiently and effectually the institution of slavery, as well as to aid in the arrest and capture of persons accused of crime in the dark ages. In such cases, however, the object sought was the arrest and capture of known fugitives, not to ascertain or furnish evidence to convict some citizen of crime. "It seems to me," says the learned justice in concluding an interesting and forceful opinion, "that the use of the bloodhound properly belonged to the days of slavery and of the bloody criminal code of the dark ages, and, inasmuch as the institution of slavery and the code aforesaid have ceased to exist, the hound should be relegated to innocuous desuetude."

The case of *Brott* v. *State,* 70 Neb. 395, 97 N. W. 593, 63 L. R. A. 789, lends strong support to Justice Guffy's dissenting opinion, *supra,* as well as to the Illinois decision first mentioned. In the Nebraska case the defendant was charged with burglary and convicted. The trial court received as evidence of guilt the fact that bloodhounds, after being taken to the place where the crime was committed, appeared to trail the burglar to the defendant's house. The opinion of the supreme court in holding this evidence incompetent is so replete with good sense and humor that a quotation *in extenso* seems warranted. The court says: "The argument of the attorney general is that the bloodhound has an exceptionally fine perception of scent; that, in following a trail and discriminating between smells, he seldom or never errs; and that knowledge of his extraordinary aptitude is so nearly universal that courts will act upon it without proof. The bloodhound has, of course, a great reputation for sagacity, and there is a prevalent belief that, in the pursuit and discovery of fugitive criminals, he is practically infallible. It is a commonly accepted notion that he will start from the place where a crime has been committed, follow for miles the track upon which he has been set, find the culprit, confront him, and, *mirabile dictu,* by accusing bay and mien, declare, 'Thou art the man.' This strange misbelief is with some people apparently incorrigible. It is a delusion which abundant actual experience has failed to dissipate. It lives on from generation to generation. It has still the attractiveness of a fresh creation. 'Time writes no wrinkle on its brow.' But it is, nevertheless, a delusion, an evident and obvious delusion. The sleuthhound of fiction is a marvelous dog, but we find nothing quite like him in real life. We repudiate utterly the suggestion that there is any common knowledge of the bloodhound's capacity for trailing, which would justify us in accepting his conclusions as trustworthy under circumstances like those disclosed by the present record. The burglary was committed on the morning of July 5, before daylight. The trailing did not commence until about five in the afternoon. In the meantime the trail, near the scene of the crime, had been walked over, closely paralleled, and crossed, directly and obliquely, perhaps a hundred times. And the sun had been shining on it steadily for more than twelve hours. The situation the dogs had to deal with was an exceptionally difficult one, and it was, we think, reversible error to accept their conclusion as legal evi-

dence of defendant's guilt. To get a nearer and clearer view of the nature of the evidence erroneously admitted, let us consider closely what trailing is. The path of every human being through the world, at every step, from the cradle to the grave, is strewn with the putrescent excretions of his body. This waste matter is in process of decomposition; it is being resolved into its constituent elements, and its power to make an impression on the olfactory nerves of a dog or other animal becomes fainter and fainter with lapse of time. Under favorable conditions, such as free exposure to air and sun, every compound particle is rapidly separated into its original parts, and, when the dissolution is complete, its characteristic scent is gone. The bloodhound is endowed with a remarkably keen scent. He has great ability for differentiating smells. His method of trailing is simple and well understood. Particles of waste matter given off by a particular individual fall to the ground and, while undergoing chemical change, come in contact with the olfactory nerves of the dog, and produce an impression which he is able to recognize as distinct and different from all other impressions. Hence, for a short time, a man may be easily trailed in the woods, or in the open country, by the effluvia in his wake. But in a city, and after the lapse of considerable time, the trailing is obviously more difficult and often, manifestly, impossible. But difficulties do not deter the bloodhound from pursuing his business. He trails as best he can. He always follows some scent, and he goes somewhere. Undoubtedly, nice and delicate questions are time and again presented to him for decision. But the considerations that induce him, in a particular case, to adopt one conclusion rather than another cannot go to the jury. The jury cannot know whether the reasons on which he acted were good or bad, whether they were all on one side or evenly balanced, or whether his faith in the identity of the scent which he followed was strong or weak. In attempting to separate one smell from ten, twenty, fifty or a hundred similar smells with which it is intermixed and commingled, it is highly probable, if not quite certain, that the bloodhound undertakes a task altogether beyond his capacity. Like other dogs, he has his limitations, and they must be recognized in courts of justice, if not elsewhere. That the conclusions of the bloodhound are, generally, too unreliable to be accepted as evidence in either civil or criminal cases, is, we believe, the teaching of that common knowledge and ordinary experience which we may rightfully bring to the examination of this subject. If such evidence were held to be legal evidence, it would, standing alone, sustain a conviction, and courts in this golden age of enlightenment would now and again be under the humiliating necessity of adjudging that some citizen be deprived of his property, his liberty, or his life, because, forsooth, within twenty-four or forty hours after the commission of a crime, a certain dog indicated by his conduct that he believed the scent of some microscopic particles, supposed to have been dropped by the perpetrator of the crime, was identical with, or closely resembled, the scent of the person who had been accused and put upon trial. There are, we know, some cases in this country which hold that this kind of evidence is competent. but, it seems, the judicial history of the civilized world is against them. The bloodhound is, we admit, frequently right in his conclusions, but that he is as frequently wrong, is a fact well attested by experience. What he does in trailing may be regarded as the declaration of a disinterested party, but, so regarded, the authorities are opposed to its admission. It is unsafe evidence, and both reason and instinct condemn it."

THE INTERNATIONAL CODE OF AERIAL LAW.

In the last days of 1909 an International Juridic Committee on Aviation was organized at Paris and with the year 1910 began publishing the *Revue juridique international de la Locomotion aérienne,* under the editorial care of A. Henry-Couannier. The committee on January 16, 1910, decided upon the outline of a legal code of the air, which has since been in course of elaboration and progress upon which is regularly reported in the committee's review. The committee itself consists of jurists, lawyers and legal students in France and French colonies, several of the states of Germany, Austria-Hungary, Belgium, Brazil, Denmark, Spain, United States, Italy, Monaco, Netherlands, Argentina, Russia, Switzerland, Turkey, Sweden, Great Britain, Scotland, Canada and Egypt. The national membership forms a national committee acting through a representative executive committee in Paris. This executive committee makes general studies upon a point of law and issues its preliminary decisions to national committees, which report back their opinions, the whole of which are harmonized so far as possible. The text decided upon in this way is definitively passed at annual congresses, which have been held at Paris in 1911, at Geneva in 1912 and at Frankfort in 1913.

The American committee consists of James Brown Scott, 2 Jackson Place, Washington, national delegate to executive committee; Charles F. Beach, 95 rue des Petits-Champs, Paris, national reporter; Denys P. Myers, 40 Mt. Vernon Street, Boston, national secretary; Arthur K. Kuhn, New York City; Gov. Simeon E. Baldwin of Connecticut, George Whitelock of Maryland, William W. Smithers of Pennsylvania, Joseph Wheless of Missouri and Ambrose Kennedy of Rhode Island.

Through the procedure above described the following text has been decided upon:

BOOK I. PUBLIC AERIAL LAW.

Chapter I. General Principles of Aerial Circulation.

Art. 1. Aerial circulation is free, except for the right of subjacent states to take certain measures, to be determined, with a view to their own security and to that of the persons and property of their inhabitants.

Art. 2. It is prohibited to pass above fortified works, into military basins and arsenals, as well as into their neighborhood within a radius determined by the military authorities.

Art. 3. It belongs to the administrative and police authorities to regulate and, if there is occasion, to prohibit aerial circulation above areas which are built over.

Chapter II. Nationality and Registration of Aircraft.

Art. 4. Every aircraft must have one nationality and one only.

Art. 5. The nationality of the aircraft is that of its owner. If the aircraft belongs to a company, its nationality will be determined by that of the headquarters of the company.

In case the owners of the aircraft are of different national-

ities, its nationality will be that of the joint owners who possess two-thirds of the value of the aircraft.

Art. 6. Every aircraft must bear a sign indicative of its nationality.

Art. 7. Every aircraft must carry with it a descriptive document containing all information proper to individualize it.

Art. 8. Every owner of an aircraft, before putting it into circulation outside of private aerodromes, must have obtained from the public authorities the inscription of this aircraft upon a register of matriculation kept by the proper authority. Each state will regulate the registration of aircraft within its own territory.

Art. 9. Every aircraft must bear a distinctive mark indicating the place of its registration.

Art. 10. The registration lists will be published.

Chapter III. Landing and Alighting on Water.

Art. 11. Aircraft may land upon unenclosed properties. They may also alight upon and navigate all waters.

Art. 12. Except in the case of *force majeure,* this right is prohibited to them:

1. In the boundaries of closed properties.
2. Within the boundaries of areas built over, ports and roadsteads, outside of spaces reserved for this purpose.
3. In navigable channels where the difficulty of passage necessitates this prohibition, which must be expressly formulated by the competent authorities.

Art. 13. Every aircraft which enters above a prohibited zone is to alight at the first signal from the competent authorities, and if it cannot do so immediately, the landing or alighting on the water is to be made as soon as possible.

Chapter IV. Jettison.

Art. 14. Jettison consists in any voluntary throwing overboard of objects, bodies or materials of any kind.

Art. 15. Jettison of all things of a nature to injure either persons or property is prohibited, except in case of imminent danger.

Art. 16. In any case, the damage done gives cause for reparation.

Chapter V. Wrecks.

Art. 17. Whoever finds all or part of a disabled and abandoned aircraft must make declaration thereof to the proper authority.

Art. 18. The competent authority, when duly advised, will immediately take the measures necessary to assure the preservation of the wreck and the discovery of the owner.

Art. 19. The owner of the wreck may reclaim it from the authorities in charge of it within the period of one year from the discovery by paying the expenses of preserving it.

In addition he must pay the finder a premium of discovery calculated on the basis of 10 per cent of the value on the day of restitution, minus expenses.

Chapter VI. Legislation Applicable and Jurisdiction Competent in Respect to Aerial Locomotion.

Art. 20. The aircraft which is above the high sea or a territory not under the sovereignty of any state is subject to the legislation and the jurisdiction of the country whose nationality it possesses.

Art. 21. When an aircraft is above the territory of a foreign state, the acts committed and the deeds occurring on board, which are of a nature to compromise the security or the public order of the subjacent state, are regulated by the legislation of the territorial state and judged by its courts.

Art. 22. Reparation for damages caused to the persons and goods above the territory of the subjacent state by an aircraft is regulated by the law of this state. The action for relief may be brought either before the courts of this state or before the courts of the state whose nationality the aircraft possesses.

Art. 23. Acts committed and deeds occurring in space on board an aircraft and which do not affect the security or the public order of the subjacent state remain subject to the legislation and the jurisdiction of the country whose nationality the aircraft possesses.

Art. 24. In case of a birth or a death on board during an aerial voyage, the pilot will make record thereof on the log-book. In the first place (*localité*) where the aircraft shall land, the pilot will have to deposit a copy of the record which he shall have made. The deposit will be made as follows: If the place is part of the territory whose nationality the aircraft possesses, to the proper public authority; if the place is situated in foreign territory, in the hands of the consul whose nationality the aircraft possesses. In case there is no consul in this place, the copy of the record will be sent by the pilot by registered mail to the consular authority, or to the competent authority whose nationality the aircraft possesses.

BOOK II. PRIVATE AERIAL LAW.

TITLE I. CIVIL.

Chapter I. Property Above.

Art. 25. No one may, on account of a property right, hinder the passage of an aircraft under conditions which do not present for him any appreciable inconvenience.

Art. 26. Any abuse of the right of passage gives cause against its responsible author for action for damages.

Chapter II. Reparation for Damage Caused by Aircraft.

Art. 27. Reparation for damage caused by an aircraft either to persons or goods that are on the surface of the earth falls on the custodian of the aircraft, the right of the injured person to look to the one responsible at common law being unimpaired.

Art. 28. The custodian, held to reparation for the damage done, has a recourse against the responsible author thereof in accordance with the common law.

Art. 29. In case the damage should be due wholly or in part to the act of the person injured, the judge shall have the right to pronounce the total or partial exoneration of the custodian.

Art. 30. The custodian may bring the exception of *force majeure* as a defense.

Art. 31. The provisions of Art. 27 are not applicable if, at the moment of the accident, the person injured or the thing damaged were transported by aircraft, or if the person injured was himself occupied in the management of the machine.

The remainder of the code is to be worked out on the following plan:

Chapter 3. (*a*) Rights of Citizens and their Application (by analogy with Art. 1382 of the French Civil Code).
(*b*) Indemnities for Landing and Jettison.
Chapter 4. *Force Majeure* in Civil Matters.
5. Terrestrial Common Law and Modifications Applicable.
6. Domicile of the Aeronaut.

Title II. Commercial.

Chapter 1. Patents and Additions Thereto.
2. International Commercial Contracts.
3. International Commercial Companies.
4. International Pledges.
5. International Rental Contract.
6. Seizure and Sale of Aircraft Outside of the Home Ports.
7. International Insurance.

Book III. Administrative Aerial Law.

Chapter 1. Highway and Aerial Roads.
2. (*a*) Administrative Regulation of Aerial Voyages.
(*b*) Police for Aerial Locomotion Above and Within the Bounds of Cities and Population Centers.
(*c*) Police for Aerial Locomotion Above Terrestrial, Maritime and Fluvial Ways.
3. Administrative Regulation of Aerodromes and Aerial Courses.
4. Guaranty of Competency of Aeronauts.

Book IV. Penal Aerial Law.

Title I. Crimes and Misdemeanors Against the Safety of States.
Title II. Crimes and Misdemeanors Against Individuals.
Chapter 1. (*a*) Abuse of Authority.
(*b*) Hindrances to the Free Exercise of Aerial Locomotion.
(*c*) Attempts Against the Safety of Aeronauts or Pilots and Their Machines.
2. Damage to Monuments.
3. (*a*) Gross Negligence.
(*b*) Involuntary Assaults and Homicides.
(*c*) Disregard of Regulations.
4. *Force Majeure* in Penal Matters.

MISDESCRIPTION OF PROPERTY IN WILLS.

In the recent case of *Re Mayell;* Foley *v.* Wood (109 L. T. Rep. 40; (1913) 2 Ch. 488), Mr. Justice Warrington, in construing a will, applied what is known as the doctrine of *falsa demonstratio.* Testators not infrequently misdescribe their property; and when, after death, the will comes to be construed, difficulty arises in deciding what property, or what part of the testator's property, the testator intended to include in the misdescription. The cases are somewhat numerous on this point. But isolated cases of the construction of particular wills are seldom of much assistance to the lawyer unless some principle is to be found in them; for in no two wills are the words identical. The slightest variation in a clause occurring in two wills may readily prevent the one case from being of any use as an authority for the purpose of construing the will in the other case.

It is proposed in this article to review the authorities on the construction of particular wills, not with a view of setting out an exhaustive category of the cases in which testators have misdescribed property, but with a view of laying before the reader the main principles on which the courts act in such cases, so that some assistance may be offered to any person seeking to construe a will where the testator has misdescribed the subject-matter of a gift. It will be necessary for this purpose to add some comments on that prolific source of difficulty—sect. 24 of the Wills Act.

There is one paramount principle to be observed in construing a will—namely, that the intention of the testator, as expressed in the will and as gathered from the whole will, is to govern all other considerations. All canons of construction, however artificial they may seem, will be found to be subject to this paramount rule. Perhaps it would be more accurate to say that they are all based upon it. Speaking generally, however, the other provisions of a will containing a misdescription of property intended to form the subject-matter of a gift throw little light on the difficulty arising from the misdescription. Hence the principles of construction established by decided cases present a somewhat artificial aspect.

The canon of construction next in importance, as regards cases of misdescribed property, is the canon *falsa demonstratio non nocet.* "The rule means," said Baron Alderson in Morrell *v.* Fisher (1849, 4 Ex. 591, at p. 604), "that if there be an edequate and sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it." Thus, for example, if a testator gives "my freehold house No. 7, Blank-street, which I bought from Jones, to X.," and it transpires afterwards that the testator purchased the house from Smith, the court will disregard the reference to Jones, as a mere error on the testator's part. It will be observed that in this example the greater part of the description of the property is a correct description of the property. What is to happen, however, if it transpires that the testator has two houses, No. 6 and No. 7 Blank street, the first purchased from Jones and the second from Smith? Whatever the rule be which is to be applied in such a case, it is not in strictness the *falsa demonstratio* rule. "The characteristic of cases within the rule," said Baron Alderson in the last-mentioned case, "is that the description, so far as it is false, applies to no subject at all; and, so far as it is true, applies to one only."

The following are notable examples of the cases where the rule has been applied: In Doe d. Dunning *v.* Cranstoun (1840, 7 M. & W. 1) a testator, after reciting that it appeared to him that one part of his "freehold lands—viz., those lands" which he held in the parishes of W. B. and M. "were held for a considerable period of time by my father's ancestors in the male line," devised "the freehold lands" which he held in the three parishes aforesaid. It subsequently transpired that only the property which he possessed in the parish of M. was freehold, but that his property in the parishes of W. and B. which he had derived from his father's ancestors in the male line was all leasehold. The court held that the property in the latter parishes, although leasehold, passed under the devise.

In Travers *v.* Blundell (36 L. T. Rep. 341; 6 Ch. Div. 436) the testator's father had purchased six closes, part of R.'s estate, and had devised them, giving the testator a power of appointment over them, by will. The testator, after reciting the devise in his father's will, by his own will appointed all that part of R.'s estate purchased by his father, consisting of four closes (which he named), to his two sons. He devised the minerals under the land to his other children. The court held that the testator had sufficiently designated the whole of the six closes over which he had the power of appointment, and that the enumeration of the four closes by name, instead of the six closes was merely *falsa demonstratio* which might be rejected.

The next canon of construction is that the rule of *falsa demonstratio* is not to be applied where there is property which fits the alleged misdescription. This canon is embodied in the maxim *non acipi debent verba in falsa demonstrationem, quae competunt in limitationem veram.* "If it stands doubtful," said Baron Alderson in Morrell *v.* Fisher (*sup.*, at p. 604), "upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all the demonstrations are true, and some where in part are true and part false, they shall be intended words of true limitation, to pass only those lands wherein the circumstances are true."

Possibly the best illustration which can be given of the distinction between this rule and the rule of *falsa demonstratio* is the instance given by Lord Bacon in his Law Tracts (p. 76, rule 13), which will be found cited in Hardwick *v.* Hardwick (L. Rep. 16 Eq. 168, at p. 173). "If," he says, "the parish of H. do extend into the counties of W. and B., and I grant my close called C., situate and lying in the parish of H., in the county of W., and the truth is that the whole close lieth in the county of B., yet, the law is that it passeth well enough, because there is a certainty sufficient in that I have given it a proper name which the false reference doth not destroy, and not upon the reason that these words 'in the county of W.' shall be taken to go to the parish only, and so be true in some sort, and not to the close and so be false. For if I had granted *omnes terras meas in parochia de H. in com. W.*, and I have no lands in W., but in B., nothing had passed. But if the close called C. had extended part into W., and part into B., then only that part had passed which lay in W."

This rule, which excludes the application of the rule of *falsa demonstratio*, and which, for the sake of brevity, may be referred to as the rule of the *limitatio vera*, was applied in the case of *Re Seal;* Seal *v.* Taylor (1894, 1 Ch. 316). In that case the testator devised his "residence called S. House and premises thereto as the same are now occupied by me." He had previously let an office standing in the yard of S. House and the stables and coach-house belonging to the house, excepting a room on the first floor of the coach-house. This latter room could only be approached through the house, and was occupied as part of the house by the testator. At the time of his death the lessees were in occupation of the office, stable, and coach-house belonging to the house. The Court of Appeal affirming the decision of Mr. Justice Chitty, held that this devise included the room over the coach-house, but that, insomuch as the house and the room over the coach-house answered the description in the will, the words relating to the testator's occupation of the premises could not be treated as mere *falsa demonstratio*, and so rejected; but that they ought to be treated as cutting down the gift to the part of the whole premises which in strictness answered every word of the description in the will.

Again, in the more recent case of *Re Brocket;* Dawes *v.* Miller (97 L. T. Rep. 780; (1908) 1 Ch. 185) Mr. Justice Joyce held that the rule of *falsa demonstratio* did not apply. In that case a testatrix devised the real estate "to which I under the codicil to the will of my late father became entitled, namely"—and she particularly mentioned certain property in Essex. After the testatrix's death it was discovered, apparently for the first time, that certain freehold property in London formed part of her father's estate, and so passed to the testatrix under his codicil. It was argued that this was a case of *falsa demonstratio*, and that the incomplete description of the property pasing under the codicil of the testatrix's father ought not to operate so as to cut down the gift. The learned judge, however, held that the London property did not pass by the devise in the testatrix's will.

Again, in the case of Doe d. Parkin *v.* Parkin (1814, 5 Taunt. 321) a testator devised all and every his messuages, tenements, lands, grounds, hereditaments, and premises situate at or in the township of T., in the parish of S. and county of Y., and then in his own occupation. The testator owned a house and five acres of land and an inn and nine acres of land all in the same locality, but he only occupied the house and the five acres. It was held that the inn and the nine acres did not pass under the devise, not being in his occupation. In Doe d. Tyrrell *v.* Lyford (1816, 4 M. Sel. 550) the testator devised his lands at S. W., in the parish of S. C. which he lately purchased from L." This was held by the court not to include land in another hamlet in the same parish purchased by the testator from L., although all the property was occupied by the same tenant.

In Smith *v.* Ridgway (L. Rep. 1 Ex. 331) a testator owned two factories, one on the east side of H-street, and the other on the west side. The one on the west was more valuable than the one on the east side. For many years they had been used as a combined earthenware manufactory, and, at the date of the will and at the time of the testator's death, they were occupied together at a single rent by two persons, R. and A. The testator devised his "messuages, manufactory, &c., on the west side of H-street in the occupation of R. and A. and others, together with all rights, members, and appurtenances to them belonging or appertaining," to certain devisees. The court held that the factory on the east side of H-street did not pass under this devise.

These two canons of construction will be found to provide assistance in the construction of many wills where the testator has misdescribed a gift, although it ought to be observed that the second canon really holds place when there has been no actual misdescription. But there are many cases of misdescribed gifts which cannot be decided merely by reference to these rules. Sometimes there is a description that cannot be fitted to any property of the deceased. Thus, in the case of Barber *v.* Wood (36 L. T. Rep. 373; 4 Ch. Div. 885) a testator devised his freehold property at M. Neither at the date of the will, nor at the time of his death, had the testator any freehold property at M. But he owned two undivided fourth shares of certain freehold property in R., to which place M. adjoined, and in the same parish in which M. was situate. Vice-Chancellor Hall, however, held that the devise did not include the property in R., and that as regards this property there was an intestacy.

But this method of solving difficulties arising from misdescriptions in a will is certainly not one which the courts incline to favor. If possible, the court will find some subject-matter for the gift. Thus, there are a number of cases where inaccurately described property has been held to pass under the inaccurate description. In Trinder *v.* Trinder (L. Rep. 1 Eq. 695) a testatrix made a bequest of "my shares in the Great Western Railway." When she made her will she had no shares in the company. Subsequently she purchased shares in the Wilts, Somerset, and Weymouth Railway. The undertaking of the latter company was subsequently vested in the Great Western Railway Company and her shares were converted into Wilts and Somerset Railway Stock of the Great Western Railway Company. Later the testatrix purchased certain stock in the Great Western Railway Company. The court held that all the Great Western and the Wilts and Somerset Stock passed under the bequest.

In the more recent case of *Re Jameson;* King *v.* Winn (1908,

2 Ch. 111) a testatrix bequeathed all her "shares in the W. and S. Banking Company." No such bank existed either at the date of the will or at the time of her death. But previous to that date of the will she had held shares in the S. and W. Banking Company Limited which, before her will was made, had been amalgamated with B. and Co. Limited, and she had received shares in the latter company in exchange for her shares in the S. and W. Banking Company Limited. Mr. Justice Eve held that these shares passed under the gift.

We now come to a brief consideration of the effect of sect. 24 of the Wills Act. That section provides that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. Applying this section to a case of a misdescribed gift, sometimes it assists the court in construing the gift. Thus, suppose a testator bequeathed his land at A. to X., and in fact he had only land at B., when he made his will: if he dies owning land at A. as well as at B., then the gift is clear, and no one could be heard to contend that the land at B. passed under the gift.

But, as was pointed out by Lord Justice Lindley in *Re Portal and Lamb* (30 Ch. Div. 50, at p. 55), the object of the section is not to defeat but to give effect to the testator's intention. Indeed the reader would do well to act warily when seeking to put some meaning upon a gift of misdescribed property by the light of this provision. In the last-mentioned case, a testator had, at the time when he made his will, a cottage and some twenty odd acres of rough land at S. W. By his will he devised "my cottage and all my land at S. W." on condition that no fir or other trees or shrubs thereon should be cut down and removed, and that the plantations, heather, and furze should be all preserved in their then present state. Afterwards he contracted to buy a dwelling-house and grounds adjoining the cottage. The Court of Appeal, reversing the decision of Mr. Justice Kay, held that the house and grounds did not pass under the specific devise mentioned above, but passed under the residuary gift contained in the will.

In his judgment, Lord Justice Lindley, after reading the section, said: "That refers to the real and personal estate comprised in the will, and nothing else. It does not say that we are to construe whatever a man says in his will as if it were made on the day of his death. . . . It is to be observed that the Act speaks of 'it'—that is, the will. When there is a puzzle as to which clause of the will carries a particular property, the statute does not say which clause is to outweigh the other, but only that the property is to be comprised in the will."

Now, it will be observed that in most reported cases where the courts have been called upon to construe a misdescribed gift, evidence is usually adduced, first, as to the property which the testator had at the time when he made his will; and, secondly, as to his property at the time of his death. It would appear that all the section does is to require, in the absence of a contrary intention expressed by the will, that the property acquired between the date of the will and the death is to be included in the will. But the question as to whether it is to be included in one part of the will or in another—*e.g.*, whether it is to be included in a specific devise or in the residuary devise—appears to be wholly unaffected. As this latter question is almost invariably the question in the case of a misdescribed gift, it follows, it is submitted, that the section can only rarely be of any use in construing a misdescribed gift. And it would appear that its application would usually be confined, in such instances, to cases where there is no residuary gift.

In the recent case of *Re Mayell;* Foley *v.* Wood (*sup.*) a testator directed his "freehold cottages and tenements, with their appurtenances, situated at T., known as Nos. 19 and 20, Castle-street," to be sold and the proceeds divided as therein mentioned. He devised his freehold cottage or tenement known as No. 35, The Conigre, T., to one beneficiary, and his freehold cottage or tenement known as No. 39 Castle-street, T., to another beneficiary. In point of fact, neither at his death nor at any other time were Nos. 19 and 20 Castle-street, the testator's property, but he owned at T. certain freehold premises known as Nos. 19 and 20 Thomas-street.

Mr. Justice Warrington held that the words "Castle-street" attached to the words Nos. 19 and 20 were mere *falsa demonstratio* and ought to be rejected, and that Nos. 19 and 20 Thomas-street, passed under the description of Nos. 19 and 20 Castle-street.—*Law Times* (London).

POINTS IN LEGAL ETHICS.

From the New York County Lawyers Association Committee on Professional Ethics.

Question No. 46. In the opinion of the Committee would it be considered unethical for a lawyer to send the following form of letter to members of the bar with whom he has a personal acquaintance?

"Dear Sir:

"In the course of your practice, you occasionally are retained to prosecute actions to recover damages for injuries sustained through negligence. If you do not keep in close touch with the different decisions of the courts as they are handed down daily, you may experience difficulties in framing a proper complaint.

"If you will send to me a full statement of the facts in any of your accident claims, I will draw the complaint for you, and a trial memorandum applicable to such case, and charge you for my services ten per cent. of the amount of the recovery or settlement. In the event of no recovery or settlement, no charge will be made.

"Trusting we may be able to do some business together in the near future, I am,"

Answer. In the opinion of the Committee, it is requisite that members of the legal profession should aim to preserve its dignity. They regard the direct and general solicitation of professional employment as undignified; for this reason, they disapprove the appeal for business suggested in the question; they also consider that such appeal might be construed as intimating a willingness to accept professional employment regardless of the merits of the case, which they also disapprove. The Committee takes this opportunity to call attention to Canon 27 of the American Bar Association respecting the solicitation of professional employment, which Canon reads in part as follows:

" . . . . . The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements or by personal communications or interviews, not warranted by personal relations, is unprofessional. . ."

Question No. 48. I am advised that it is not unusual in this

community for auctioneers, who conduct sales of real property in foreclosure suits, to divide their auctioneer's fee with the referees who are appointed by the courts to make such sales. Does not the Committee consider such a practice on the part of referees to be unprofessional?

Answer. The Committee is not apprised otherwise than by the question that the practice mentioned is ever indulged; it would be loath to believe that it is either usual or not unusual; but it considers such action would be grossly improper.

THE UP-TO-DATE DEFENSE OF CY N. IDE.

By J. W. Foley.

(Reproduced in Steils *v.* State, 7 Okla. Crim., 391.)

Remarks by Counsel.

Now, may it please the court and you,
Peers of the realm, who come to do
Your highest duty in the land—
As jurymen, you understand—
I outline briefly for our side
The case for Mr. Cy N. Ide—
My client here—whose whole life shows
Him pure as the new-falling snows;
A victim, I may say, of chance
And much confusing circumstance.

Preliminary Objections.

First, then, we ask the court to quash
The whole indictment—pray read Bosh
On Bluff and Bluster, chapter two:
"Ink must be black and never blue;
And if the ink used is not black
'Tis ground to send the whole case back!"
The rule, pray please the court, is plain;
But here I read the law again—
I quote now from authority
Of Blow and Buncombe, chapter three:
"If any 't' shall not be crossed,
Or dot of any 'i' be lost,
These grave omissions, then, shall be
Enough to set defendant free!"
So here we have the law; and see—
Here is a naked, uncrossed "t"!

Collateral Exceptions.

So the indictment, then, is wrecked—
Full of omission and defect.
Judge Pinn Hedde, in his able work
On Fifteen Thousand Ways to Jerk
The Props from Prosecution, says:
"A comma, standing out of place
In the indictment, may upset
The very best indictment yet.
Far better Murder should go free
Than we should have an uncrossed 't'!"

Particular Error.

So, on these vital points I might
Insist upon my client's right
To be set free; but there are more
On which we set much greater store:
The witness Blank, when on the stand,
Was sworn while raising his left hand;
And so his evidence, no doubt,
The honored court will have thrown out.
And in support of this I read
From Shyster on the High Court's Need
Of Being Even More than Loath
To Tolerate a Left-Hand Oath!

General Objections.

If this were all, it were enough
To set my client free—see Bluff
On Half a Thousand Reasons Why
The Law Loves a Technicality.
But, lest your honor should refuse
Our claims, my client now renews
Objection to the court, its looks,
Its jurisdiction, and its books;
Objection to the evidence,
Indictment—as to form and sense;
Objection to the desks and chairs,
The tables and state counsel's airs—
In fact, my client now objects
To everything: and he expects
To show, by Bluff, by Crook, by Bragg,
By Shyster, Petti Fogg and Snagg,
By that great friend of crime, D. Lay,
By Trick, by Subb Terr Fuge and Stay,
That he should be set free because
Of all these loopholes in the laws.

Constitutional Privileges.

My client, Cy N. Ide, now please
The court, no technicalities
Would urge, save that they all transgress
The constitutional—express,
Implied, declared, and specified—
Prerogatives of Cy N. Ide,
Who stands here, making naught but one
Request—that Justice shall be done!
And we are here, as man to man,
And mean to do Her if we can!

Express Reservations.

Now, please the court, we do not waive
A single right that we can save;
And we except—some more, some less—
To jurors, clerks, and witnesses.
And, having made our attitude
As clear and frank as well we could,
We come now to the minor phase
Of testimony in the case.

Insanity.

First, we have shown by proof quite plain
That Cy N. Ide is hardly sane.
The eminent Doctor Ale Yay Nisst,
By reflexing my client's wrist
And tapping on his frontal bone,
Finds absence of the Moral Tone.
And Doctor Ekks Spurt finds one ear
The thousandth of an inch too near
The cheek—a symptom, as you see,
Of irresponsibility.
So, by your oaths, you should agree
To Cy N. Ide's insanity,
And so acquit him of intent
And free him, that he may repent.

The Alibi.

But we have other proofs, if this
Phase of defense may seem amiss:
My client, Cy N. Ide, proves by
His witnesses an a-lie-by.
He was, upon the fatal day
This deed was done, ten miles away;
So, if you find him sane, you're bound
To free him on this other ground,
As jurors who are sworn to do
The will of justice, good and true,
Whichever way you look you will
Find Cy N. Ide impregnable
As truth itself—no crime can lie
With such a perfect a-lie-by.

Evidence of Self-Defense.

But, if again you are in doubt
Of how this crime has come about,
My client gives sworn evidence
The deed was done in self-defense.
The victim of this homicide
Made fierce attack on Cy N. Ide,
As he so graphically swore,
With sword and pistol—aye, and more!
And, as he shot and stabbed and tried
To end the life of Cy N. Ide,
My client, much to his dismay,
Was forced to shoot or run away;
And so he shot—the deed was done,
Since he was lame and could not run!
So it is plain the evidence
Is ample proof of self-defense.
And so you must acquit, you see,
On one ground, two, or even three!

No Corpus Delicti.

But not alone on this defense—
This bulwark firm of evidence—
Do we rely; for we have brought
The eminent expert, Tellus Watt,
And he quite sturdily agrees
The victim died of heart disease.
In which event the case must fall,
Since there was no crime done at all.
The eminent expert, Tellus Watt,
Says, in the interval 'twixt shot
And when the bullet struck its mark,
Excitement quenched the vital spark
Within the victim's breast; and he
Died, not of crime, but naturally.
So, here, again, my client stands
And asks acquittal at your hands.

Exceptions, Requests, Motions, Petitions Ad Libitum.

Now, please the court, we ask the case
Dismissed—'tis now the time and place.
And, failing that, we move the court
Instruct the jury to report
A verdict of not guilty! Should
The court not hold our motion good,
We ask the jury to acquit
On any ground it may see fit—
Insanity, if it so please;
Or a-lie-by or heart disease;
Or self-defense. If homicide
Is found, we ask it set aside,
And, failing that, we straightway move
Another trial, that we may prove
A new defense—if 'tis denied,
We ask an appeal certified.
And, failing that, we ask to be
Petitioners for clemency.
And, failing that, we ask but leave
To file petitions for reprieve.
And failing that—well, Cy N. Ide
By then will have grown old and died!

Cases of Interest.

Liability of Newly Formed Corporation for Services Rendered by Promoter.—In Cushion Heel Shoe Co. *v.* Hartt, (Ind.) 103 N. E. 1063, the court holds that the better reason and the weight of authority are to the effect that in the absence of statutory or charter provisions, a corporation will be held liable for services rendered by its promoters before incorporating only when by express action taken after it has become a legal entity, it recognizes or affirms such claim. It is stated, however, that there are authorities which make the corporation liable if it receives benefit from the services rendered, although it does not expressly ratify the claim.

Legality of Quarantine Established by Conversations of Members of Health Board over Telephone and Not at Regular Meeting.—That a quarantine may be established by a board of health by conversations over the telephone between the members of the board, and does not require a regularly called meeting of the board, is the holding of the North Dakota Supreme Court in Plymouth Tp. *v.* Klug, 145 N. W. 130, wherein Judge Burke for the court said: "The powers of the township board are prescribed by law, and among others we find, section 282, R. C. 1905: 'It shall be the duty of each local board of health, whenever it shall come to its knowledge that a case of . . . contagious disease exists within its jurisdiction, immediately to examine into the facts of the case and, if such disease appears to be of the character herein specified, such board shall adopt such quarantine and sanitary measures as in its judgment tend to prevent the spread of such disease.' . . . While it is true that the meetings of the township board must be upon three days' notice, yet we do not believe the statute contemplated the delay of a regular meeting when such an emergency as a contagious disease is presented. To require the board to act in this deliberate manner would defeat the very object of a quarantine law. Besides the law as above quoted says that the board shall 'immediately' examine, etc."

Ownership of Wolf Mortally Wounded by One Person and Killed by Another.—In Liesner *v.* Wanie, (Wis.) 145 N. W. 374, a question arose involving the ownership of a wolf killed under the following circumstances. The plaintiffs had mortally wounded the animal, and while in pursuit and about to acquire actual possession it was shot at and killed by the defendant. On these facts it was held the plaintiffs were the owners of the wolf. The court said: "It is conceded that if the plaintiffs had substantially permanently deprived the wolf of his liberty, —had him so in their power that escape was highly improbable, if not impossible, before defendant appeared on the scene and with his gun pointed so as to reach within some three feet of

the animal delivered a finishing shot, it had become the property of plaintiffs and was wrongfully appropriated by appellant. Such is according to the prevailing rule. The instant a wild animal is brought under the control of a person so that actual possession is practically inevitable, a vested property interest in it accrues which cannot be divested by another's intervening and killing it. The Law of Animals, Ingham, 5. Such is the law of the chase by common law principles, differing from the more ancient civil law which postponed the point of vested interest to that of actual taking. The evidence in this case very strongly tends to establish all the facts requisite to ownership of the wolf by plaintiffs,—so strongly that all reasonable doubts in respect to the matter, if any would otherwise have remained, might well have been removed by the superior advantages which the trial court had. In the light of other evidence, all reasonable doubts may well have been removed as to who delivered the shot which so crippled the animal as to cause him to cease trying to escape, thus permitting appellant to substantially reach it with the muzzle of his gun at the instant of delivery of the finishing shot. That at such instant, the plaintiffs were in vigorous pursuit of the game, the evidence is clear, and that in a few moments, at most, they would have had actual possession, is quite as clear."

Physical Suffering Occasioned by Birth of Child Resulting from Seduction as Element of Damage in Action for Breach of Promise.—There are authorities which take the view that in an action for breach of promise of marriage in which a seduction is a proper element in aggravation of damages the physical suffering occasioned by the birth of a child resulting from the seduction may not be considered in determining the damages, but an opposite view has been taken in Booren *v.* McWilliams, (N. D.) 145 N. W. 410, wherein that part of the opinion material to the question is as follows: "The authorities on physical suffering occasioned by childbirth constituting a proper element of damages in an action for breach of promise aggravated by seduction are not in harmony. Some hold that they are too remote from the cause of action, which, of course, is the breach of promise. Others hold to the contrary. It is true that there must be some line drawn beyond which facts do not constitute an element of damages in such case. In no case can the plaintiff recover all the damages directly and incidentally occasioned by the wrongful act of the defendant. We are disposed, however, to agree with the statement of this doctrine given by Mr. Sutherland in section 985 of his work on Damages, wherein he says: 'If seduction is on principle an element of damages in an action for breach of promise, and the disgrace or injury to reputation which follows it is such an element, it seems illogical to exclude any direct result of the seduction from the consideration of the jury. Mental suffering may result from seduction without pregnancy following, but compensation for disgrace or injury to reputation must be based on the theory that seduction has resulted in pregnancy. Hence the physical suffering and the expenses connected with confinement where pregnancy follows seduction are not more remote than injury to reputation.' Authorities holding that in such an action the fact of the birth of a child may be shown are not in point on this question, however. In conflict with the opinion of Mr. Sutherland, see Giese *v.* Schultz, 53 Wis. 462, 10 N. W. 598; Giese *v.* Schultz, 65 Wis. 487, 27 N. W. 353. We hold that it was not error for the court to charge that the jury might, in case it found for the plaintiff, take into consideration the physical pain incident to the birth of the child, in fixing the damages."

Validity of State Statute Prohibiting Importation of Women for Immoral Purposes.—That the effect of the "White Slave" Act passed by the Congress of the United States is to make invalid any state statute prohibiting the importation of women for immoral purposes, is the holding of the Montana Supreme Court in State *v.* Harper, 138 Pac. 495, the reason being that such importation constitutes interstate commerce within the meaning of the term as used in the Federal Constitution vesting in Congress exclusive jurisdiction to regulate that subject. The state sought to sustain the constitutionality of the statute in question on the ground that it was an exercise of the police power and consequently could be enforced although it was a direct regulation of interstate commerce, but the court said: "Of certain quarantine regulations of the state of Louisiana it was remarked by the Supreme Court of the United States: 'While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of federal authority as defined by the constitution, the latter must prevail.' Morgan Steamship Co. *v.* Louisiana, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. ed. 237. The provision before us declares that, under certain circumstances, women and girls are not legitimate subjects of commerce. No one will dispute it, but the controlling power to make that declaration rests with Congress; otherwise the power vested in Congress to regulate interstate commerce may be circumscribed by the ability of the state to determine what shall or what shall not be regulated. 'The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated.' License Cases; Peirce *v.* New Hampshire, 5 How. 597, 600, 12 L. ed. 256."

Right of Property Owner to Damages for Injury Done to the Property by Municipality Exercising Governmental Functions.—There is a conflict of authority on the question whether the owner of property which has been injured by the pollution of a stream running through it, may recover damages from a municipality responsible for the pollution, where the municipality was in the exercise of its governmental functions when the wrongful acts resulting in the creation of the nuisance occurred. North Carolina, however, is one of the states holding the municipality liable, as is seen from the recent case of Donnell *v.* City of Greensboro, 86 S. E. 377, wherein the court said: "The decisions of this state are in approval of the principle that the owner can recover such damage for a wrong of this character, and that the right is not affected by the fact that the acts complained of were done in the exercise of governmental functions, or by express municipal or legislative authority; the position being that the damage arising from the impaired value of the property is to be considered and dealt with to that extent as a 'taking or appropriation,' and brings the claim within the constitutional principle that a man's property may not be taken from him, even for the public benefit, except upon compensation duly made. This decision, announced in Little *v.* Lenoir, 151 N. C. 415, 66 S. E. 337, in an opinion by Associate Justice Manning, was re-affirmed and applied in the more recent cases of Moser *v.* City of Burlington, 162 N. C. 114, 78 S. E. 74; Hines *v.* Rocky Mount, 162 N. C. 409, 78 S. E. 510, and is sustained, we think, by the great weight of authority in this country. . . . The courts of Indiana, and probably cases in one or two of the other states, seem to have adopted the contrary view. In the case from Indiana to which we were more particularly referred (City of Valparaiso *v.* Hagen, 153

Ind. 337, 54 N. E. 1062, 48 L. R. A. 707, 74 Am. St. Rep. 305), the question more directly presented was the right of certain riparian owners to an injunction against the discharge of the sewage into the streams rather than the right of recovery for damages suffered. To the extent, however, that this and other cases of like kind tend to uphold the position that any and all recovery is denied for wrongs of this character where the acts complained of are done pursuant to governmental authority, they are not, in our opinion, in accord with the better reason, nor, as stated, with the weight of well-considered authority."

Validity of Statute Prohibiting Unnaturalized Foreign-Born Resident from Killing Wild Game or Owning Gun.—In 1909 the state of Pennsylvania passed a statute making it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal except in defense of person or property, "and to that end" made it unlawful for such foreign-born resident to own or be possessed of a shot gun or rifle. The statute provided a penalty for the violation and a forfeiture of the gun. This statute has just been declared by the Supreme Court of the United States not in violation of the Fourteenth Amendment of the United States Constitution, and not in contravention of the treaty between the United States and Italy to which latter country the defendant in the case in which the question arose belonged. The name of the case is Patsone *v.* Commonwealth of Pennsylvania, and it is reported in 34 Supreme Court Reporter 281. On the question whether the statute violated the United States Constitution, Mr. Justice Holmes, writing the opinion of the court, said: "Under the Fourteenth Amendment the objection is twofold; unjustifiably depriving the alien of property, and discrimination against such aliens as a class. But the former really depends upon the latter, since it hardly can be disputed that if the lawful object, the protection of wild life . . . warrants the discrimination, the means adopted for making it effective also might be adopted. The possession of rifles and shot guns is not necessary for other purposes not within the statute. It is so peculiarly appropriated to the forbidden use that if such a use may be denied to this class, the possession of the instruments desired chiefly for that end also may be. The prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense. . . . The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. . . . The question therefore narrows itself to whether this court can say that the legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. . . . Obviously the question, so stated, is one of local experience, on which this court ought to be very slow to declare that the state legislature was wrong in its facts. . . . If we might trust popular speech in some states it was right; but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong."

Efficacy of Judgment Rendered in Foreign Country.—An interesting question involving the enforcement of foreign judgments in the state courts of the United States arose in Grubel *v.* Nassauer, (N. Y.) 103 N. E. 1113, the facts being as follows: In December, 1901, the defendant and his wife departed from the empire of Germany, of which country, or of the kingdom of Bavaria, which is a constituent part of such empire, he was a subject and resident. He came to the city of New York, where he took up his residence and engaged in business. In June, 1906, the defendant filed notice of his intention of becoming a citizen of the United States. Subsequent to that time, and on July 11, 1907, the plaintiff, also a resident of and a subject of Bavaria, recovered in the courts of that kingdom a judgment against the defendant on an obligation alleged to have been incurred before the latter's departure from that country. The process on which the judgment was founded was not served upon the defendant personally, but by publication, and at that time he was not within the empire. It was held on the above facts that the foreign judgment was without efficacy in the New York courts. The court of Appeals in so holding commented on the case as follows: "The whole argument of the appellant is based on the proposition that at the time of the recovery of the judgment the defendant was still a subject or citizen of Germany or Bavaria, and therefore, bound by its laws. In one sense this is doubtless true, and it may be assumed that the judgment is conclusive against the defendant in the country where it was recovered, and there would be enforced against him or his property. But the judgments of the courts of no country have necessarily any extraterritorial effect. When they are enforced in a foreign country, which as a rule they are to a certain extent, it is solely by virtue of comity. The elaborate review of this subject by the Supreme Court of the United States in Hilton *v.* Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95, renders further discussion unnecessary. The question, then, is how far comity should induce us to respect a foreign judgment obtained without personal service of process against a citizen of a foreign country domiciled here at the time of the recovery of the judgment. There is some confusion of the dicta of text-writers on the subject (Story's Conflict of Laws, § 599 et seq.; Black on Judgments, § 836 et seq.), and there has been fluctuation in the decisions of the courts. The only case, however, I can find in which a judgment of a foreign country recovered against a citizen of that country, upon whom, absent therefrom, constructive service only was had, was upheld, is that of Douglas *v.* Forest, 4 Bing. 686. In that case the judgment was recovered in Scotland and enforced in England. The grounds on which the decision was made are not very clearly stated in the opinion. On the other hand, in Smith *v.* Grady, 68 Wis. 215, 31 N. W. 477, the court refused to recognize a judgment recovered in a court of Canada against a Canadian residing in Wisconsin, who was personally served with process in that state. We think the decisions below were right on principle. By the requirement of the Federal Constitution each state is required to give full faith and credit to the judgments of the other states. It is not a matter of comity between the states, but of obligation imposed by the paramount law. Yet it is settled that a judgment for money recovered in one state without personal service of process on the defendant in that state cannot be enforced without the state. In Pennoyer *v.* Neff, 95 U. S. 714, 727 (24 L. Ed. 565), it was held: 'Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to the proceedings against them. Publication of process or notice within the state where the tribunal sits can-

not create any greater obligation upon the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.' It seems to us unreasonable that we should give greater respect to judgments recovered in a foreign country than to a judgment recovered in one of our sister states."

Whether Bigamy Results from the Second Marriage of One Under the Age of Consent When First Marriage Was Contracted.—In Garner *v.* State, Ala. 64 So. 183, it appeared that while an infant under the age of consent, being at the time between fourteen and fifteen years of age, the defendant contracted a marriage, which was followed by voluntary cohabitation of the parties to the ceremony in recognition of the marital relation for a short time (not more than a day or two, according to the defendant's testimony on the trial), when he left her. Subsequently, about five years thereafter, the first marriage not having been annulled by judicial proceedings, the defendant married another woman, and was prosecuted for bigamy for having contracted this second marriage. The defendant as a witness in his own behalf testified that he remained with his first wife one or two days after the marriage, during which time they occupied the relation of husband and wife, that he discovered or learned during this time that she was unchaste before marriage, and that he then left her and had not lived or cohabited with her since that time. The defense then offered to show by the defendant, testifying as a witness in his own behalf, that he had told his first wife at the time he left her that he "was no longer her husband, and that she was no longer his wife;" that he had then and there severed the marriage relation and disaffirmed the marriage. The court sustained the objection of the solicitor to the questions seeking to make this proof, and on appeal by the defendant from this ruling of the court, after a judgment of conviction, it was held by the Alabama Court of Appeals that the ruling was proper. In its opinion that court said: "The contention is made that this testimony was admissible on the authority of the holding in Beggs *v.* State, 55 Ala. 108, where it was remarked by the judge rendering the opinion for the court, as dicta, that either party to the marriage, being under the age of consent at the time, upon arriving at age could disaffirm the marriage, thereby avoiding it, and that the second marriage, contracted subsequent to the disaffirmance, would not be in violation of law. It is plainly stated in the opinion in that case that no question was raised in the trial court as to the affirmance or disaffirmance of the first marriage, and that such a question was not presented on the appeal. It was decided in that case that the marriage entered into by one under the age of consent is not void as to such infant, but voidable only, and until disaffirmed is a marriage in fact, and sufficient to support a prosecution for bigamy in contracting a second marriage. We take it that what is meant by a disaffirmance of the marriage contracted by a person under the age of consent, as used in the Beggs case, *supra,* has reference to the prior marriage having been duly and regularly disaffirmed by the infant through judicial proceedings of a court of competent jurisdiction annulling it. . . . The first marriage in this case is shown by the evidence to have been a completed matrimonial engagement, not void, but at most voidable only as to the defendant because at the time of entering into it he was under the age of consent prescribed by statute. Code, § 4879. Marriage being a civil or social institution intended and calculated to promote the present comfort and future happiness of the human family, and fixing as it does a status between the contracting parties which society in general has the deepest interest in maintaining in its integrity and purity, it could not be annulled or disaffirmed by the mere *ipse dixit* of the defendant in renunciation or denial of it, or by his repudiation of the wife at his election for this or any other cause, but the dissolution, annulment, termination, or disaffirmance of the voidable marriage could only be accomplished by the sovereign power of the state, speaking through a duly constituted tribunal having jurisdiction in the premises. It will be seen that it is our opinion that the fact that the defendant at the time of his first marriage was under the statutory age of consent is no defense to a charge of bigamy for contracting a second marriage unless the first marriage had been judicially annulled on that ground (Walls *v.* State, 32 Ark. 565; State *v.* Cone, 86 Wis. 498, 57 N. W. 50), and that the court was not in error in refusing to allow the defendant to testify as a witness in his own behalf that he had renounced or personally undertaken to disaffirm the relations or status created by the first marriage, shown in this case without conflict in the evidence to have been a marriage in due form, followed by voluntary cohabitation of the parties as husband and wife."

Use of Person's Name and Picture on Moving Picture Film as Entitling Him to Injunction and Damages.—In Binns *v.* Vitagraph Co. of America, 103 N. E. 1108, the New York Court of Appeals had before it an appeal from a judgment enjoining a moving picture company from using the name and picture of John R. Binns, for trade purposes, without his consent, and awarding damages. Binns, it will be remembered, was the wireless operator on board the steamship Republic at the time of its sinking in mid-ocean in 1909, after being in collision with the Florida. The action was founded on a New York statute providing that any person whose name, portrait or picture was used within the state for advertising purposes, or for the purposes of trade, without the written consent of such person first obtained, might maintain an equitable action to prevent and restrain the use thereof, and to recover damages by reason of such unlawful use. The facts in the case showed that soon after the day of the collision the defendant proceeded to make a series of pictures entitled " C Q D, or Saved by Wireless; A True Story of the Wreck of the Republic." These pictures, with the exception perhaps of one or more taken of the Baltic as it entered the harbor of New York, were manufactured or made up in the studio of the defendant, by the use of scenery prepared for the purpose, and of actors employed to impersonate the plaintiff and others. A series of picture films were thus prepared, from which moving pictures could be produced for public exhibition. Such pictures were exhibited in many places in the state of New York by authority of the defendant. The series of pictures commenced with a subseries entitled "John R. Binns, the Wireless Operator in his Cabin Aboard the S. S. Republic." This subseries was followed by others, the last one of the series being entitled "Jack Binns and his Good American Smile." The picture of Binns appeared in the series of five times, and his name was used in the subtitles six or more times. On these facts the judgment was affirmed, and an opinion rendered by Judge Chase, in part as follows: "A picture within the meaning of the statute is not necessarily a photograph of the living person, but includes any representation of such person. The picture represented by the defendant to be a true picture of the plaintiff, and exhibited to the public as such, was intended to be, and it was, a representation of the plaintiff. The defendant is in no position to say that the picture does not represent the plaintiff, or that it was an actual picture of a person made up to look like and impersonate the plaintiff. It is not necessary in this opinion to discuss the question whether

a person, firm, or corporation would be liable under the statute for making and using a picture of a living person, when it is included in a picture of an actual event, in which such person was an actor, and such picture is a mere incident to the actual event portrayed. The use of the plaintiff's name and picture, as shown by the testimony in this case, was not a mere incident to the general picture representative of the author's understanding of what occurred at the wreck of the Republic. The first picture of the series was essentially a picture of the plaintiff, although included therewith was a place having relation to the other parts of the pictures exhibited; but the last picture of the series had no connection whatever with any other place or person or with any event. His alleged personal movements, as exhibited in the now well-known form of moving pictures, had no relation to the other pictures, and it was not designed to instruct or educate those who saw it. The defendant used the plaintiff's alleged picture to amuse those who paid to be entertained. If the use of the plaintiff's name and picture as shown in this case is not within the terms of the statute, then the picture of any individual can be similarly made and exhibited for the purpose of showing his peculiarities as of dress and walk, and his personal fads, eccentricities, amusements, and even his private life. By such pictures an audience would be amused, and the maker of the films and the exhibitors would be enriched. The greater the exaggeration in such a series of pictures, so long as they were not libelous, the greater would be the profit of the picture maker and exhibitor. We hold that the name and picture of the plaintiff were used by the defendant as a matter of business and profit, and contrary to the prohibition of the statute. It is urged that there is danger of serious trouble in the practical enforcement of any rule which may be adopted in construing and enforcing the statute so far as it relates to purposes of trade. If there is any basis for the suggestion of danger in enforcing a part of the statute under consideration, it is the duty of the legislature to repeal such part thereof, or so modify it as to define with greater particularity what it intends should be prohibited, or perhaps permit the use of a person's name, portrait, or picture for purposes of trade, if the oral assent of such person or, if a minor, of his or her parent or guardian is obtained therefor."

New Books.

Jurisdiction and Procedure in United States Courts. By Robert M. Hughes, M.A., of the Norfolk (Va.) Bar. Second Edition. St. Paul, Minn., West Publishing Co., 1913.

The profession is of course well acquainted with the Hornbook Series of text books, and with that one prepared by Mr. Hughes, the second edition of which is at hand. The publication of the first edition in 1904 gave the lawyer practicing in the federal courts an admirable treatise of ready reference on the jurisdiction and procedure of such courts, and it gave the law student in his course on federal pleading and pleading the essentials of the subject stated clearly and precisely. There have been a number of important changes in federal procedure since the first edition was written. For one thing circuit courts have been abolished, and their jurisdiction given over to the district courts. So new rules have very materially affected equity practice in federal courts. Furthermore, while the present bankruptcy act was then in existence, it had not been in operation long enough for the courts to construe it judicially to any considerable extent. Since then, however, many important decisions have been rendered involving its construction. The present edition therefore was needed, and being the work of a specialist in federal practice, for that is what Mr. Hughes is, it will unquestionably take a high place among the treatises on the subject.

Municipal Corporations. By Roger W. Cooley, LL.M., Professor of Law, University of North Dakota. St. Paul, Minn., West Publishing Co., 1914.

Professor Cooley's treatise is a new contribution to the Hornbook Series of text books, referred to above. It follows the plan adopted in the earlier volumes in the series, the special features being a succinct statement of leading principles in black letter type, a more extended commentary elucidating the authorities, and notes and authorities. The author states that the object of the book is to present in concise form the general principles of the law of the subject. He teaches it in the University of North Dakota, and the treatise is designed especially for law students, though, as he says, practitioners should find it of value because of its concise statement of general principles, its citation of authorities, and illustrative cases. Professor Cooley has had years of experience in legal writing and thoroughly understands the art of proper arrangement of material. His book is likely to attain the same popularity that its predecessors in the series have attained.

The Validity of Rate Regulations, State and Federal. By Robert P. Reeder of the Philadelphia Bar. Philadelphia, T. & J. W. Johnson Co., 1914.

This book deals with the principles of constitutional law, which are involved in rate regulation, and considers in turn the various provisions of the United States Constitution which touch the subject, such as the commerce clause, the due process clause, the equal protection provision, the right to just compensation for private property taken for public use, the clause prohibiting preferences as to ports, and that prohibiting the impairment of contracts. In addition to all this there is a chapter devoted to the distribution of governmental powers, wherein is discussed the extent of the power of courts, legislatures, and other bodies, in the matter of rate regulation. To treat exhaustively the subject under discussion would require more space than Mr. Reeder has given it, for the authorities are numerous, and the discussions therein lengthy. He has not, however, confined himself merely to a bare statement of the principles of constitutional law involved, but has discussed the purposes of those who placed in the Federal Constitution the provisions which bear upon rate regulation. The collection of authorities seems reasonably complete, and the facts of some of the more important are given. Altogether the author has given an intelligent, and for general purposes an adequate, treatment of intricate problems of constitutional law arising from the efforts of the people to control public service corporations engaged in interstate commerce, by fixing charges for transportation.

Federal Income Tax Annotated. Compiled and edited by John H. Sears. Detroit, Mich., Counselors Publishing Co., 1913.

What we have here is a loose leaf binder containing court decisions, opinions of the attorney general, and treasury decisions pertaining to the Federal Corporation Tax Law of 1909; also the text of the new Federal Income Tax Law, and the regulations and decisions pertaining thereto, emanating from the Treasury Department. It is the purpose of the publisher to supply the subscriber with all new matter affecting the construction and enforcement of the income tax law as fast as it appears. This new matter will come to the subscriber in the shape of loose sheets and pamphlets, which are to be inserted by him in the binder. An index will also be furnished from time to time to

make it easy for him to find what the loose sheets and pamphlets contain. The plan is unique, and if carried out as promised will give one an always up-to-date compilation affecting a most important piece of legislation.

Year Book. New York County Lawyers' Association. New York, Chambers Printing Co., 1913.

The New York County Lawyers' Association is an organization of lawyers created in 1908 for the cultivation of the science of jurisprudence; the promotion of reforms in the law; the facilitation of the administration of justice; the elevation of the standards of integrity, honor and courtesy in the legal profession; and the cherishing of the spirit of brotherhood among the members of the association. It is said that there are about fifteen thousand lawyers in Greater New York, three thousand of whom are members of the New York County Lawyers' Association. There is another organization of lawyers known as the Bar Association of the City of New York, containing a membership of eighteen hundred. This latter organization is much older, less democratic, and with initiation fees and dues considerably higher, than the newer organization, which was intended to get nearer the great mass of lawyers. There is no rivalry between the two, and the prominent lawyers of the city as a rule belong to both. The year book before us is the fifth which has been published, and its contents include the membership list, the names of the officers and directors, the various committees and their personnel, the reports of said committees, and the addresses delivered at the annual bar dinner of the association in honor of the Hon. James Bryce, at that time British ambassador. The most valuable report is that of the committee on Professional Ethics, containing as it does answers to twenty-two questions in which its advice was sought during the year. The average county bar association makes no effort to raise the standards of the bar. Members constantly commit offenses which should lead to disbarment, or at least to rebuke. The New York County Lawyers' Association is an exception. It has made a real effort to raise the standards of professional ethics, and much success has crowned its efforts. We compliment it on what it has done for the bar of New York County, and wish it continued prosperity.

News of the Profession.

Oklahoma Judge Resigns.—Justice R. L. Williams of the Supreme Court of Oklahoma resigned from the bench on March 10.

Reappointed to Appeal Tax Court.—Judge John Gill, Jr., has been reappointed a member of the Appeal Tax Court of Baltimore, Md.

The North Carolina Bar Association will hold its next annual convention at Wrightsville Beach on June 29 and 30, and July 1, 1914.

Appointed Attorney General of New Jersey.—Judge John W. Wescott of Haddonfield has been appointed Attorney General of New Jersey.

Death of Ohio Judge.—Virgil Lowry, judge of the Common Pleas court of Hocking county, Ohio, was found dead on February 9 in his office at Logan, Ohio.

Resigns from Bench in Nevada.—Judge L. N. French of the district court of Churchill county, Nev., has tendered his resignation to Governor Oddie.

Indiana State Bar Association.—The 1914 meeting of the Indiana State Bar Association will be held at Indianapolis instead of at Richmond.

To Be Assistant Attorney General.—Attorney General George Cosson of Iowa has appointed as an assistant in his office Wiley S. Rankin of Mason City.

Chicago Municipal Court Judge Dies.—Judge David Sullivan of the Municipal Court of Chicago died at that city on February 28, aged fifty-seven years.

Wisconsin State Bar Association.—The next annual meeting of the Wisconsin State Bar Association will be held at Madison on June 24 and 25, 1914.

Missouri Judge Dies.—William Dougherty Rusk, judge of the Missouri circuit court, died at St. Joseph, Mo., on February 20. Judge Rusk was sixty-two years old.

Appointed Referee in Bankruptcy.—R. A. Train of Shreveport, La., law partner of the late Alfred Land, Jr., has been appointed to succeed Land as referee in bankruptcy in Louisiana.

Named United States Senator.—W. S. West, a lawyer of Valdosta, has been appointed by Governor Slaton of Georgia as United States Senator to succeed the late Senator A. O. Bacon.

Appointed Circuit Judge in Missouri.—W. H. Haynes, of St. Joseph, Mo., has been appointed judge of division No. 1 of the circuit court of Missouri to succeed the late Judge W. D. Rusk.

Federal Judge Dies.—James S. Young, aged sixty-six, judge of the United States District Court and one of the most prominent members of the bar in Western Philadelphia, died suddenly at Pittsburgh, Pa., on February 25.

Change in Iowa Superior Court.—Judge E. T. O'Connor of the Oelwein (Ia.) superior court resigned from the bench on February 13. Governor Clarke has appointed John R. Bane of Oelwein to fill the vacancy.

Death of Arkansas Judge.—Judge Lawrence A. Byrne, aged sixty, died at Texarkana on March 4. Judge Byrne was formerly a circuit judge of Arkansas and frequently served as special associate justice of the Supreme Court.

Fills Vacancy on Superior Bench.—Frank M. Trexler of Allentown, former judge of Lehigh County, has been appointed judge of the Superior Court of Pennsylvania to fill the vacancy caused by the death of General James A. Beaver.

Named Chairman of Finance Commission.—John R. Murphy, attorney, of Charlestown, Mass., has been named as chairman of the Boston Finance Commission. He succeeds John A. Sullivan who recently resigned to become corporation counsel of Boston.

Father Resigns—Son Appointed.—T. J. Nunn, for the past eleven years a judge of the Kentucky Court of Appeals, has resigned from the bench because of ill health. His son, Clem S. Nunn, has been appointed temporarily to fill the vacancy.

Death of New Jersey Judge.—Garret D. W. Vroom, former judge of the New Jersey Court of Errors and Appeals, reporter for the Supreme Court, banker, lawyer, bibliophile and grower of roses, died at Trenton, N. J., on March 4, aged seventy-one years.

Heads New York City Bar Association.—George W. Wickersham, formerly attorney general of the United States, has been elected president of the New York City Bar Association, to succeed William B. Hornblower, recently elevated to the Court of Appeals bench.

Appointed District Attorney in Massachusetts.—Governor Walsh of Massachusetts has appointed James G. O'Shea of Holyoke as district attorney of the western district to succeed Christopher T. Callahan, who was recently appointed to the superior court bench.

Named Appellate Judge.—Circuit Judge T. M. Harris of Lincoln, Ill., has been appointed by the Illinois Supreme Court to the bench of the appellate court of the fourth district, to fill the vacancy caused by the resignation of Owen P. Thompson of Jacksonville.

Death of Canadian Judge.—Daniel Woodley Prowse, of Newfoundland, died on January 27. Judge Prowse was born in 1834, at St. John's. He was educated partly in England, was called to the Colonial Bar in 1858, and took silk in 1870. He was a judge of the District Court from 1869 to 1898.

Appointed to Common Pleas Bench in Ohio.—C. H. Wright of Logan has been appointed judge of the court of common pleas of Logan county, Ohio, to fill the vacancy caused by the death of Judge Virgil Lowry. Governor Cox has also appointed John Duff of Columbus as common pleas judge of Ottawa county to succeed Judge Scott Stahl, resigned.

Prominent Canadian Dead.—Sir George William Ross, senator of the Dominion of Canada and formerly premier of the Province of Ontario, died in Toronto on March 7, after an illness lasting several weeks. He was born in 1841. By profession a lawyer, Sir George was known popularly as "the Father of the New Ontario," owing to his immense activities in the development of that province. He was called to the senate of Canada in 1907, and was knighted by King George in 1910.

Changes Among United States Attorneys.—J. Robert O'Connor of the San Diego bar has been appointed by Attorney General McReynolds as second assistant United States attorney for the southern district of California.—Mrs. Annette Adams has been appointed assistant United States attorney at San Francisco.—John E. Green has been appointed United States attorney for the district of South Texas.

Chicago Lawyer Appointed Counsel for Labor Commission.—W. O. Thompson of Chicago has been appointed counsel of the United States commission on industrial relations. Mr. Thompson, who is an expert on labor problems, will accompany the commission and take an active part in the hearings to be conducted in different parts of the country to develop a basis for an effort to improve relations between employers and employees.

Chief Justice Clabaugh Dead.—Chief Justice Harry H. Clabaugh of the Supreme Court of the District of Columbia died suddenly at Washington on March 6. Justice Clabaugh was fifty-eight years old. He was born at Cumberland, Md. In 1895 he was elected attorney general of Maryland and served until March, 1899, when he was appointed to an associate justiceship of the District Supreme Court. He was appointed chief justice on May 1, 1903.

Death of Law Writer.—Lawrence J. Bur, for the past three years one of the most valued members of the editorial staff of the Edward Thompson Company at Northport, L. I., died at Philadelphia on March 22, aged 38 years. Mr. Bur formerly resided in Philadelphia, and was for a number of years one of the editorial force connected with the publication of Pepper & Lewis's Digest of Pennsylvania Decisions. The death of Mr. Bur occurred after a comparatively brief illness, and the literary side of the law has thereby met with the loss of a brilliant and energetic contributor.

The New Prime Minister of Sweden.—M. Kjalmar de Hammarskjoeld, the new Prime Minister of Sweden, is a lawyer with more than national fame. A short time ago he was prominently before the world in connection with the Casablanca affair, as arbitrator, when he decided in favor of France. No man in Sweden has had a career more rapid or more occupied. Born in 1862, he was for some time professor of law in the University of Upsala. In 1901 he became minister of justice, and a year later was appointed president of the Court of Appeal. After three years he was back again in politics and a cabinet minister. He was sent to Karlstad, as plenipotentiary, at the conferences which resulted in the dissolution of the union between Sweden and Norway. He was next appointed governor of Upsala, and first commissioner for Sweden in the negotiations with Germany for a treaty of commerce. He is a member of the tribunal at The Hague, and it is safe to assert that no Swede within recent years has played so important a part in the great affairs of state as has Dr. Kjalmar de Hammarskjoeld.

National Civic Federation.—Announcement has been made by the National Civic Federation of the appointment of a committee on "Free Speech and Public Assembly" in connection with the survey which the federation now is making of social and industrial progress in the United States during the last generation. Members of the new committee are Alton B. Parker; Stephen S. Gregory, Chicago, one-time president of the American Bar Association; Frederick N. Judson, lawyer, St. Louis, Mo.; Peter W. Meldrim, lawyer, Savannah, Ga.; Henry St. George Tucker, Lexington, Va., one-time president of the American Bar Association; William M. Ivins, New York; James Bronson Reynolds, of the American Social Hygiene Association; J. H. Ralston, lawyer, Washington, D. C.; Charles L. Jewett, lawyer, New Albany, Ind., and Joseph H. Choate, Jr., lawyer, New York.

Florida State Bar Association.—The annual convention of the Florida State Bar Association was held at Tallahassee on February 26, 27 and 28. The president's address was delivered by Hon. W. A. MacWilliams of St. Augustine. Senator Thomas T. Walsh of Montana delivered the annual address. At the banquet held on the evening of February 27, Duncan U. Fletcher was toastmaster, and toasts were responded to as follows: "The Bar," by Fred. T. Myers; "The Judiciary," by Judge T. M. Shackleford; "The Lawyer in Politics," by W. S. Jennings; "The Income Tax," by F. M. Hudson; "The Outgo Tax," by W. H. Price; and "The Lawyer as a Lawmaker," by W. A. MacWilliams. The following officers for the ensuing year were elected: President, W. H. Price of Marianna, ninth circuit; vice presidents, one for each circuit, first, T. F. West; second, J. A. Edmondson; third, Stafford Caldwell; fourth, Alston Cockrell; fifth, J. B. Gaines; sixth, William Hunter; seventh, L. C. Massey; eighth, A. V. Long; ninth, C. L. Wilson; tenth, T. L. Wilson; eleventh, A. A. Boggs; secretary, J. C. Cooper, Jr., reelected; treasurer, F. B. Winthrop of Tallahassee; executive council, W. A. MacWilliams, E. P. Axtell, W. W. Hampton and F. T. Myers.

Other Deaths.—In addition to the deaths heretofore mentioned in this column, the following recent losses to the profession may be noted: Feb. 6, at Red Lodge, Mont., Sidney Fox, aged 46, for six years on the district court bench of Red Lodge; Feb. 7, at Abilene, Kan., T. C. Henry, former president of the Kansas State Bar Association; Feb. 8, at Linn, Mo., R. S. Ryors,

former judge of the Missouri circuit court; Feb. 9, at Louisville, Ky., Horace C. Brannin, aged 60, Kentucky consul for Mexico; Feb. 9, at East St. Louis, Mo., Walter S. Louden, former collector of internal revenue and judge of the Illinois Court of Claims; Feb. 10, at St. Martinville, La., Edward Simon, aged 90, former judge of the Louisiana district court; Feb. 14, at Canandaigua, N. Y., Charles O. Townsend, aged 56, at one time county judge and surrogate of Seneca county, N. Y.; Feb. 14, at Keytesville, Mo., Oscar F. Smith, former probate judge and prosecuting attorney; Feb. 17, at Ellsworth, Me., Edward E. Chase, former judge of the West Hancock municipal court and judge of probate for Hancock county; Feb. 21, at Little Rock, Ark., Alexander M. Duffie, for sixteen years judge of the circuit court of Arkansas; Feb. 28, at Coffeyville, Kan., Stephen J. Osborn, former judge of the twenty-third judicial district of Kansas; March 4, at Boston, Louis C. Stearns of Bangor, former judge of probate for Aroostook county, Me.; March 5, at Vinton, Iowa, Frank Brown, at one time judge of Buffalo county, Nebraska; March 6, at Texarkana, Ark., Lawrence A. Byrne, former circuit judge of Arkansas; March 8, at Keene, N. H., John T. Abbott, former minister plenipotentiary to the republic of Colombia.

English Notes.

New Lord Chief Justice of Ireland.—The Right Hon. Richard Robert Cherry has been appointed Lord Chief Justice of Ireland in succession to Lord O'Brien, resigned. Lord Justice Cherry was called to the Irish Bar in 1881 and took silk in 1900.

Appointed County Court Judge.—Mr. Francis Reynolds Yonge Radcliffe, K. C., has been appointed Judge of County Courts, Circuit No. 36, in place of His Honor Judge Sir T. W. Snagge, K. C. M. G., deceased. Mr. Radcliffe was called by the Inner Temple in 1873, and took silk in 1904.

Judges and Pensions.—The comptroller and auditor-general in his report on the Consolidated Fund Account, 1913, refers to the case of a county court judge who, on retiring within five months of his appointment, received an annuity of £500 under section 24 of the County Courts Act, 1888. He states: "I am, however, not informed whether any system or regulation exists for securing in judicial as in other public appointments, that the persons appointed have the necessary physical fitness, failing which they come prematurely on a pension list, which, unlike the ordinary civil pension list, is not statutorily safeguarded by any requirement of a minimum period of public service or by graduation of pension according to length of tenure of office." These observations show a singular lack of comprehension of the difference between a judge's pension and those paid to ordinary civil servants. A judge on accepting office foregoes both his practice which he has personally built up and acquired, and a considerable amount of professional income which is by no means compensated for by the salary paid. There is, however, the dignity of the position and the pension, after fifteen years' service or on incapacity by reason of health in the high court, and on permanent infirmity in the county court. The ordinary civilian gives up nothing on entering the public service which is his whole professional career.

"All" as a Noun.—It is not apparently a contempt of court to speak of the "remarkable ignorance of grammar on the part of the court," as the learned editors of Jarman on Wills do in the sixth edition of that monumental work, p. 455 (*m*). It is stated in the text that in an old case "the words 'I give all to my mother, all to my mother' were adjudged insufficient to carry the testator's land to his mother, as it was wholly doubtful and uncertain to what the word 'all' referred." It is said in the note that one of the arguments which weighed with the court was that "all" was an adjective and not a substantive, and then came the disparaging remark referred to. It certainly seems hard that when the testator had emphasized his wish that all was to go to his mother by repeating it, still she did not get the land. Mr. Justice Eve has retrieved the reputation of the court for knowledge of grammar in the recent case of *Re* Shepherd by holding that "all" was a noun in the will before him, where the testator gave and bequeathed "all" to certain people. In old days the court was very tender to heirs-at-law and would not permit them to be disinherited except by plain words. Nowadays the intention of the testator, as shown in his will, however inaccurately expressed, prevails over the claims of the heir. "Bequeath" is used as a word to pass personalty in wills which are artistically drawn, but, as Lord Romilly said in Whicker *v.* Hume (14 Beav. 509, at p. 518), "the word 'bequeath' is large enough to carry real estate if distinctly applied to it." At any rate, in the opinion of Mr. Justice Eve the omission of the word "devise" was not sufficient to limit the idea of totality conveyed by the use of the word "all," and it was decided that the testator's real estate had passed under the will.

Obiter Dicta.

The Whale Incident.—Marvel *v.* Jonah, 86 Atl. 968.

Making the Birds Sing?—Beer *v.* Canary, 2 N. Y. App. Div. 518.

Slang from the Bench.—"As a stickler for principle, one Samuel Pickwick, Esq., 'had nothing' on the parties to this action."—*Per* Barnes, J., in Morehouse *v.* Voight, 151 Wis. 580.

Pity 'Tis 'Tis True.—"A song that is sung cannot well be delivered back, to the re-establishment of the *status quo* of either singer or audience." See Charley *v.* Potthoff, 118 Wis. 263.

A Sepulchral Joke.—"Cemeteries . . . were not intended to be embraced within the description of places of public accommodation and amusement." *Per* Cartwright, J., in People *v.* Forest Home Cemetery Co., 258 Ill. 43.

A Keen Sense of Humor.—In volume 75 of the American State Reports, at page 424, there is a note on the subject of "Dead Bodies." The writer plunges boldly into his subject as follows: "This is a live topic as far as litigation is concerned."

Alpha and Omega.—The opinion of the court in People *v.* Durham, 170 Mich. 598, opens thus: "The actions of certain predatory pigs and a double-barreled shotgun marked the beginning and end of the events out of which this prosecution developed." Lest misunderstanding should creep in, we venture to add that the pigs came through unscathed.

Don't Wear Well.—"Without intending to reflect upon the wife in this case—for I take it for granted the libelant is to blame—still I warn all plain men against marrying women by the euphonious names of Dulcinea, Felixina, etc.; these melting, mellifluent names will do for novels, but not for every-day

life." *Per* Lumpkin, J., in Standridge *v.* Standridge, 31 Ga. 225.

Just Like the Rest of Us.—"The members of this court have only a passing acquaintance with money. We see but little of it, nor see that little long, and hence we will not attempt to decide that there is any material difference between a banker's check and a certified check. All checks look alike to us, provided our creditors will accept them." See Holland *v.* Mutual Fertilizer Co., 8 Ga. App. 718.

Many There Are of the Same Kind.—Adverting to certain testimony by the defendant in Berghuis *v.* Schultz, 119 Minn. 87, Judge Philip E. Brown says: "It reminds us of a conversation from Robert Louis Stevenson's 'Kidnapped,' between Allan Breck and David Balfour: 'Can you swear that you don't know him, Allan?' asked David, referring to the Appin murderer. 'Not yet,' replied Allan; 'but I've a grand memory for forgetting, David.'"

The National Game.—That baseball is the most popular of all sports in America has been suspected for some time. At last, however, by virtue of judicial pronunciamento, belief has become knowledge. "This court," says Mr. Justice Furman, in State *v.* Lawrence, (Okla.) 130 Pac. 510, "takes judicial notice of the fact that the game of baseball, when properly conducted, is an innocent public amusement, and constitutes the most popular and entertaining public pastime or sport of the American people."

Obstinate Court.—In Morrison *v.* Chicago, etc., R. Co., 257 Ill. 376, Mr. Chief Justice Dunn shows us just how obstinate a court can be at times. He prefaces his opinion with these remarks: "The only question in this case is decided adversely to the appellee in Village of Norris *v.* Lyon, 251 Ill. 457, but the counsel for the appellee thinks that case was decided wrongly and should be overruled, and he convinced the county judge that he was right. We are not convinced, however, but are constrained to adhere to our conclusion."

The Biter Bit.—In a rural district in Nova Scotia, two neighbors had a falling out about a line fence. One of them made dire threats against the other, in fact threatening to do him some bodily injury. The threatened person went up to the city and laid before the magistrate a complaint against his neighbor, praying that he be bound over to keep the peace. The magistrate promised to have an officer go down and make the arrest, but the roads were bad, and it was thirty miles away, and after a few weeks, still failing to find a constable to execute the warrant, he wrote to the complainant to that effect, at the same time telling him to avoid if possible meeting with his neighbor. In a few days a letter came to the magistrate as follows:

"Mr. Stipendiary Magistrate. Dear Sir—You needn't send no Constable down here after ———. He will be up to see you when he gets well. I met him on the road yesterday and licked h——l out of him. Yours truly ———."

Mr. Smith Furnishes More Copy.—Some months ago, there appeared in the Obiter Dicta column of Law Notes, a court notice, reprinted from the *New York Law Journal*, purporting to have been prepared and published by Mr. James B. F. Smith, Calendar Clerk of the Supreme Court, New York County. That notice was unique. One of our readers recently directed our attention to another of Mr. Smith's literary outbreaks, which is worthy of reproduction. We copy it verbatim from the *New York Law Journal*, of February 26, as follows:

COURT NOTE.

Supreme Court, First District,
Special Term for Trials.
Calendar Clerk's Office.

The calendar of a Call to be made on Friday 27th instant at 2 P. M. is published in to-day's *Law Journal*.

By direction of the court, Mr. Justice Page, causes called on February sixth's Call, where a day was asked for trial, indicating an intention to effect a position on the March Day Calendars and not a trial in February, so pre-empting the Day Calendars in February, these were sent to this Call of the 27th instant, when a position may be had in the ensuing March term. This ruling secured Day Calendars of ready causes in the present February term.

The Day Calendars were up to date in the February term. Under a ruling of Mr. Justice Page causes on the Day Calendars in the term moved to a subsequent day in the term went to the end of causes previously set for that date. The method gives equal right to all causes.

A stipulation signed by the attorneys of record may be filed setting a cause on this Call Calendar for a day in the March term or to a future Call. A stipulated cause will not be called on the 27th instant.

By jussive amendment of Rules II and VIII (regulating Special Term, &c.) motions for judgment on pleadings, sections 547 and 976, C. C. P., since February 1, 1914, are made in Part III, Special Term.

James B. F. Smith,
Calendar Clerk.

Correspondence.

The Trial Judge as a Thirteenth Juror.

To the Editor of Law Notes.

Sir: I want to know if some subscriber will give me a good legal reason for the existence of the following opinion, in a state that holds that the jury are the judges of what constitutes contributory negligence, knowledge of danger, proximate cause, reasonable care, etc., where there is no complaint that they failed to follow the instructions of the court.

Cumberland Telephone & Telegraph Co. *vs.* Smithwick et al., 112 Tenn. 463.

New trial granted by supreme court where circuit judge refused it, but expressed his dissatisfaction with verdict.

If the circuit judge is dissatisfied with the verdict of the jury, it is his duty to set it aside and grant a new trial; and if it appears to the supreme court, from statements made by the circuit judge in passing upon the motion for a new trial, that he was really not satisfied with the verdict, but refused to set it aside, it is the duty of the supreme court, when it has acquired jurisdiction of the cause, to grant a new trial on the ground of the trial judge's dissatisfaction with the verdict.

Cases cited and approved: (fifteen in number—all Tennessee cases.)

Same. Reasons for rule.

The reasons for the foregoing rule are, in substance, that the judge hears the testimony, sees the witnesses, and observes their demeanor upon the witness stand, just as the jury does; that he is especially qualified for correction of errors the inexperienced jury may have made, for which purpose he is the thirteenth juror.

Same. Reasons needlessly given by circuit judge considered by supreme court to determine his satisfaction or dissatisfaction with verdict.

In deciding the motion for a new trial, the circuit judge is not bound to give any reasons for his decision, any more than the jury is bound to do so; and if he gives reasons for his action, the supreme court looks to them only for the purpose of determining whether he passed upon the issues, and was satisfied or dissatisfied with the verdict thereon.

Same. Case in judgment.

Where a special judge in refusing a motion for a new trial states that he is not satisfied with the verdict, and has grave doubts whether he should not set aside the verdict, and believes he would do so if he were the regular judge, the supreme court will grant a new trial, because of his dissatisfaction with the verdict.

J. B. Webb.

Memphis, Tenn.

The Negotiable Instruments Law in Indiana.

To the Editor of Law Notes.

Sir: In the January, 1914, number of your excellent monthly, Law Notes, you failed to name Indiana as one of the States which have adopted the Uniform Negotiable Instruments Law. This act was adopted by the Indiana General Assembly at its last session, in March, 1913, and appears as Chapter 63 of the published laws of 1913.

T. J. Moll.

Indianapolis.

Lex Loci.

To the Editor of Law Notes.

Sir: The following recent experience may be interesting to some of your readers:

A school teacher in one of the North Shore suburbs of Chicago was arrested for an alleged assault upon one of his pupils. Case came on for hearing at nine o'clock one Saturday morning before the local police magistrate and a jury. The assault having been proven, and in fact admitted, the defendant attempted to justify on the ground that he stood "in loco parentis" to the pupil, and was authorized to use such force as he considered necessary to maintain discipline, and was attempting to show, by witnesses, that the pupil was and for a long time had been a disturbing element in the school, when objection was made by the prosecution. The magistrate was inclined to sustain the objection and to hold that the defendant could not so justify, when defendant's counsel offered to read, in the presence of the jury, from a text book the views of the author on the subject, which were based upon decisions of courts in other states. Counsel for the prosecution objected and contended that it was not proper to be read in the presence of the jury, and that the jury were not concerned with the law of other states, but only with the law of Illinois. The magistrate promptly agreed with him, and refused to allow the views of the author and decisions quoted by him to be read, whereupon counsel for the defendant, in desperation, insisted that the book he desired to read must be a treatise on the law of Illinois on the subject, because he had obtained it from the "Chicago Law Institute." The magistrate took the book, examined it carefully, and seeing the unmistakable evidences on the book that it was the property of the Chicago Law Institute, at once concluded that unless the book was one on Illinois law it would not have been contained in the Institute library, and promptly reversing himself, allowed the authority to be read and the examination to proceed. The trial continued until midnight, when the jury retired, and after remaining out until about 1:30 Sunday morning, they agreed to disagree, and were discharged.

Morton T. Culver.

Chicago.

Judge Cullen on Personal Liberty.

To the Editor of Law Notes.

Sir: Your March number Law Notes is at hand. I have read the Hon. Edgar M. Cullen's article, entitled "The Decline of Personal Liberty." Now, I do not know the age of this writer or the state of his health, but I do honestly believe he is too pessimistic. Such articles are prepared now and then, presented to the public, but promptly ignored by the public. There is something within the average man of to-day which gives him an unshaken faith in government. He realizes his own mistakes and expects to find them written also in the laws of the land.

I take issue with his statement that we have too many criminal laws on the statute books. While the legislature enacts the laws, the people enforce them. I have generally found that the criminal laws have been humanely enforced, and, if not, a jury will promptly acquit. During such time as we have a healthy state, never be afraid of the statute books. The people will take care of them.

He mentions the liquor interests, apparently deploring their present condition, and then asks "whether individual liberty is still to obtain in America." If he had asked whether individual nuisance is still to obtain in America, he would probably have been better understood by the great majority of American people. There is something wrong with the liquor business, or else it does not conform to present day standards. Whichever it may be, the people are solving the question. It may be stated positively that the question will not be settled upon the basis of personal liberty.

I very rarely quarrel with a writer, and I am not trying to do so with the Hon. Edgar M. Cullen, but I do feel that we should take a more cheerful aspect of present day conditions. We are advancing with great strides; our legislatures are behind, haltingly following the procession of the people. What they have been able to accomplish for the people, their masters, has been mixed both with evil and the good, yet it will all work out for a greater America.

Lusk, Wyo. M. H. Neil.

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Law Notes

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Limitation upon Courtship.

WE learn that a movement has been started by a number of prominent Boston women to limit by law the length of courtships. Two years has been settled upon as the time limit for courting, and a bill will be introduced in the Massachusetts legislature making it illegal to prolong courtship beyond that period. The avowed purpose of the proposed legislation is to protect marriageable girls from suitors who dally too long before popping the question. This is a worthy movement and should be heartily speeded. Attention need hardly be called to the fact that spinsterhood is an all too prevalent condition in Massachusetts, as elsewhere in New England. It would be ungracious to attribute this to a want of charm in the sex in that locality. In view of the movement that has been inaugurated the condition in question may be due to the fickleness or possibly the faint-heartedness of our New England swains. Whatever the cause, the condition seems to be sufficiently grave to warrant our colonial dames in casting about them for a remedy, and the legal intervention contemplated may prove to be alleviative. Of course, we don't quite see how the proposed legislation is to be enforced after it is enacted. But the Boston matrons who had the courage to propose the legislation may find means to make it effectual. The young men of the Bay State may well take warning as to the danger that will attach to frivolous flirting after the proposed law goes into effect.

On Wearing Hats in Court by Women Lawyers.

THE male members of the legal profession will note with relief the action of the chief justice of the Supreme Court of the United States in requiring a woman member of the bar to remove her hat when she entered the enclosure reserved for members of the bar. True, the young woman in question had upon her head only a mortarboard cap, which with the accompanying academic gown that she wore must have given her a quite Portia-like appearance that in no way, it seems, should have shocked the justices of that august tribunal. But give a woman an inch in the matter of hats and she will be taking an ell. The crowning glory of a woman's apparel is her hat, and if she is permitted to wear it in court at the attorneys' table her brother attorney upon the other side will be placed at a decided disadvantage. The Goddess of Justice, of course, is proverbially blind. She hears but does not see. We much fear, however, that the bandage over her eyes would suffer displacement in her curiosity as to the head-gear of the feminine pleader for her favor. The august incumbent of the woolsack would be likely to find a legal argument more persuasive when the dulcet tones of femininity were reinforced by the latest creation of the milliner's art. And at nisi prius before juries these adventitious aids might be used with such telling effect that the real merits of the cause would be entirely obscured. No, our fair disciples of Blackstone should rest satisfied with their natural advantages over their male confrères at the bar, nor seek to supplement these advantages by the borrowed charms of apparel. "Hats off, ladies!"

Teaching Law in the Public Schools.

FORMER Chief Judge Cullen of the New York Court of Appeals, speaking to the alumni of the Columbia Law School, made the suggestion that the principles of the law be taught in the public schools in order to end in a great measure the clamor against the courts. We have not had the benefit of a perusal of Judge Cullen's address and are therefore at some loss to understand how a modicum of knowledge of the law among school children can be expected to mitigate the prevalent criticism of the courts. Making, however, a different application of Judge Cullen's suggestion, a short course in law might not be without value as a part of the public school curriculum. Blackstone, it will be remembered, thought that a competent knowledge of the laws of that society in which we live was the proper accomplishment of every gentleman and scholar. This proposition holds as true to-day as in Blackstone's time, and perhaps there is no better place for imparting the rudiments of legal knowledge than in our public schools. The grammar school, however, is hardly the place for that study. Too many superficialities have already crept into our intermediate schools at the expense of the fundamental "three R's." But a high school course might be fittingly rounded out by devoting a part of the last term to the study of the rudiments of the law. The knowledge thus gained would in many cases be supplemented by further reading and study after graduation, and there would thus in time be built up a large body among the laity sufficiently familiar with the law and with legal processes to exercise an intelligent and a wholesome influence both upon legislation and upon the administration of the law.

Night Law Schools.

IT appears that the American Law School Association has taken action barring from membership in the association schools giving evening courses in the study of

law. The association is of the opinion that such courses tend to lower the educational standards. Dean Ashley of the New York University School of Law protests against this action of the association, characterizing it as "an undeserved stigma" upon law schools giving evening work. The New York University Law School has been giving evening courses for many years, and the records of that institution for the last fourteen years show that the night law school men have maintained a higher standard than the day men. Of 1,876 graduates—1,322 day and 554 evening—36 per cent of the night men attained an average higher than 70 in their work, while only 33 per cent of the day men exceeded that average. So far, therefore, as the New York University Law School is concerned the action of the Law School Association cannot be successfully defended. And the night law school in that university may be fairly typical of such schools elsewhere. There is much in the night law school that makes for efficiency. The student has made sacrifices in order to avail himself of the advantages of the school, and he therefore realizes the value and importance of every minute of the time he spends there. He works under pressure. His mind is concentrated upon the work in hand to the exclusion of everything else. "This one thing I do." And he will not be likely, either, to stop studying after he has been admitted to practice, but will utilize the considerable leisure of his legal novitiate to enlarge the boundaries of his legal knowledge. After all it is not so much the time when or the place where one studies, as it is the energy, determination, and pluck of the student that tells in the long run. Abraham Lincoln began studying law while perched on the top of a woodpile that he had been hired to chop; and a law book was his constant companion wherever he went. Had there been night law schools in his day it is safe to say that Lincoln would have been among the first to matriculate as a student.

If the American Law School Association had placed its ban on the night schools upon the ground that too many young men are being admitted to the ranks of the profession, its position would have been impregnable. Taking the country over, the demand for lawyers is not, perhaps, equal to the supply. But that is a different question. And if we must check the supply we may as properly begin with the day as with the night law schools.

The Right to Hiss in Theaters.

The ancient common-law right to hiss a play if done within bounds has recently been reaffirmed by a Dublin magistrate, who discharged a man accused of hissing a theatrical performance. The defendant said the play was "foreign filth" and he considered it his duty to protest. His protest, it seems, was so violent that the play was interrupted for some minutes.

The right to hiss in a theater appears to have been first affirmed in 1810, in the case of *Clifford* v. *Brandon,* 2 Camp. 358, 11 R. R. 731, wherein the rule was laid down that the audience in a public theater has the right to express by applause or hisses the sensations which naturally present themselves at the moment. But if a number of persons go to the theater with the settled intention of hissing an actor, or even of damning a piece, such a deliberate and preconcerted scheme amounts to a conspiracy, and the persons concerned in it may be brought to punishment.

In a note to *Clifford* v. *Brandon, supra,* it is stated that Macklin, the famous comedian, procured the indictment of several persons for a conspiracy to ruin him in his profession. They were tried before Lord Mansfield; and it being proved that they had entered into a plan to hiss the plaintiff as often as he appeared on the stage, they were found guilty under his lordship's direction. Judgment, however, was never pronounced against the defendants, and the reporter states that he had been unable to find any authentic account of the trial. See, however, the note to *Gregory* v. *Brunswick, infra,* for an extrajudicial account of this case. In *Gregory* v. *Brunswick,* 1 C. & K. 24, 6 M. & G. 205, reported in 1843, the defendants were sued for conspiracy to hiss off the stage an actor who was appearing as Hamlet. They set up that they considered the man's private character and career so bad as to disqualify him from playing. They admitted that they did "a little hoot, hiss, groan and yell at the plaintiff, and make a little noise, outcry and uproar at and against the plaintiff," but they made only such a disturbance "as for the causes aforesaid" (the plaintiff's character) "they lawfully might." In summing up in this case, Tindall, C. J., said: "There is no doubt that the public who go to a theater have the right to express their free and unbiased opinions of the merits of the performers who appear upon the stage, and I believe that no persons are more anxious that the public should have that right than the actors themselves, for if it were laid down that persons who exercised their free judgments would be subject to actions for damages, not only would it be fatal to the actors on the stage, but it would prevent persons from frequenting the theater at all. At the same time parties have no right to go to the theater by a preconcerted plan to make such a noise that an actor, without any judgment being formed on his performance, should be driven from the stage by such a scheme, probably concocted for an unworthy purpose; and therefore it is only if you can see by the evidence that has been given, that the two defendants had laid a preconcerted plan to deprive Mr. Gregory of the benefits which he expected to result from his appearance on the stage, that you ought to find a verdict against them."

There was a verdict for the defendants in the case, which the court approved on a motion for a new trial. We may therefore deduce the law to be that one may safely hoot, hiss, groan, or even yell at a play, provided these expressions of disapproval are the spontaneous outcome of his feelings and not the result of a conspiracy to discredit the performance.

More Baseball Law.

An article in our February issue considered the question as to the validity of the so-called "reserve" clause in baseball players' contracts, and reviewed the cases bearing upon that question. A further contribution to baseball law is made by Chancellor J. P. Henderson at Hot Springs, Ark., who recently rendered a decision in the injunction proceedings between the Federal League and the Pittsburgh National League baseball club making permanent the injunction granted previously to the National League club against interference by the Federal League with players under contract with the Pittsburg club. Chancellor Henderson holds that a baseball con-

tract is property and entitled to consideration as such; that no person has a right to induce a breach of such a contract, and that interference therewith will be restrained by injunction. In his review of the case the chancellor says: "Under the facts in this case, the defendant knew plaintiff was here at Hot Springs training its men for the opening day. He came to Hot Springs to procure some of the players of plaintiff and offered them over one thousand dollars in advance of their contract price with the plaintiff to breach their contracts with plaintiff and hire to his company. He was bound to know it would work a great injury to the plaintiff. I can see no purpose of the defendant except to employ plaintiff's players and thereby deprive the plaintiff of entering the baseball games as a competitor, and by reason thereof defendant's company would greatly benefit financially. It is just such a wrong as a court of equity should not permit when appealed to."

Chancellor Henderson also declared that while the contracts made by the Pittsburg National League club with its players lacked mutuality and were therefore voidable at the instance of the players, third parties could not avail themselves of the invalidity of the contracts to interfere with their fulfillment by the parties themselves.

Hard upon the heels of this decision comes the ruling of United States District Judge Sessions at Grand Rapids, Michigan, in the Killifer case, wherein the Federal League sought to restrain Killifer from playing with the Philadelphia National League club in violation of his contract with the Federal League. The Philadelphia club made claim to Killifer's services under the option clause of its prior contract with him. Judge Sessions holds the option or reserve clause of the Philadelphia club contract invalid, but denies the injunction sought by the Federal League on the ground that in entering into negotiations with Killifer the Federal League did so with the knowledge that the Philadelphia club had a moral right to his services, and therefore the Federal League did not come into equity with "clean hands"—an indispensable requisite upon an application for equitable relief.

The decision of Judge Sessions covering the "reserve clause" will, it appears, have little practical effect in view of the form of the new contract which organized baseball is now making with ball players. The new contract contains an option clause which provides that in return for a stated sum the player agrees to sign a 1915 contract for the same salary he receives this year. The option clause in last year's contracts stipulated that for 25 per cent of the compensation received the player gave the club a right to sign him again this year at a salary to be mutually agreed upon. The new contracts have eliminated many other objectionable features in the old contracts, and it is confidently believed that the new contract—including the option clause—will stand the legal test.

Judicial Verdict Paring.

A BILL is before the Massachusetts legislature which is designed to place a check upon the power of a judge to set aside or to reduce the amount of the verdict of a jury in damage cases. The bill permits the court to interfere with the jury's finding only where "passion, prejudice, corruption, gross error or fraud is found to exist," and in each case the cause is to be stated in writing. The Boston *Post* in discussing this measure says:

"The *Post* has more than once expressed its opinion that the setting aside or cutting down of damage verdicts by judges is inconsistent with the vital principle of jury trials. It is, therefore, free to commend Sherman L. Whipple's remarks before the committee on judiciary at the State House yesterday in favor of the bill providing that judges shall state their reasons in writing for such actions. This would not change the system entirely, but it would tend to make its practice less frequent. Mr. Whipple is right in saying that this verdict cutting is 'an invasion of the right of trial by jury and a serious abuse of judicial discretion. The jurymen go back to their communities and feel that their judgment has been flouted by the judge, and they feel and the community may feel that it was done for sinister motives. The jury is just as much a part of the court as the judge, and its judgment should not be set aside for that of the judge except in rare cases.' If a jury is to be considered competent to assess damages at all, its verdict should stand, save in cases of self-evident corruption, prejudice or fraud. If, on the other hand, judges are to be permitted to slice down damages at will, it would be more logical to give them the whole power of assessing, leaving to the jury the mere decision that damages ought to be awarded a plaintiff, if his case is proven. Imagine the chorus of disapproval if that latter plan were to be enforced by law. And yet, though it is not established in legal theory, it is so in practice whenever a judge thinks he knows more than a jury—not as to law, not as to evidence, in which his superior knowledge is undisputed—but as an estimater of the financial balm a winning plaintiff ought to be given. This exercise of the one-man power over verdicts as against the finding of the 12 is another of the points wherein lies reform of the judicial system. And it is by no means the least important."

A strict adherence to the theory of jury trial does not seem to leave any room for the arbitrary exercise of judicial power in reducing the amount of damages awarded by the jury, for the amount of damages that a plaintiff has suffered is as much a litigable issue as is the liability of the defendant, and when these issues are properly before the jury for determination their finding as to the damages should be treated with as great respect by the court as their finding upon the question of liability. Courts have, however, from a very early period exercised the prerogative of reducing jury awards. It has become the settled practice for the court, where it considers the damages excessive, to make a remittitur by the plaintiff the condition of a denial of the defendant's motion for a new trial. This practice has been repeatedly sanctioned by the courts. In *Arkansas Valley Land Co.* v. *Mann*, 130 U. S. 69, Mr. Justice Harlan, in affirming the right of the court thus to require the successful party to remit a part of the damages assessed, as a condition upon which the court will render judgment upon the verdict, said: "The practice (of requiring a remittitur) is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. . . . But, in considering whether a new trial

should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require plaintiff to submit to a new trial unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint. Notwithstanding such remission, it is still open to him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or in the appellate court, that such errors of law were committed as entitle him to a new trial of the whole case."

FEDERAL TRADE COMMISSION.

The Chamber of Commerce of the State of New York has passed resolutions opposing a Federal Trade Commission such as is proposed in a bill which has been introduced into Congress. In the opinion of the Chamber the so-called Sherman Act as finally interpreted and elucidated by the courts is proving more satisfactory and more effective than new legislation, needing new interpretation by judicial decisions, would probably prove to be for years to come. By the action of the Chamber of Commerce a special committee was directed to enlarge, in the form of a brief, the views of the Chamber as expressed in the resolutions. This Committee has made its report, which is comprised in a printed statement, in which the proposed legislation is exhaustively considered and the dangers of its hasty enactment pointed out. Starting with President Wilson's statement in his message that what the government was purposing to do was "happily, not to hamper or interfere with business as enlightened business men prefer to do it or in any sense to put it under the ban," that "no measures of sweeping or novel change are necessary," and that what had to be done could be done "in a new spirit, in thoughtful moderation and without revolution of any untoward kind," the Committee says that the tentative bills have widely missed the mark of both the spirit and the purpose of the President's pronouncement. "These bills," says the committee, "instead of avoiding 'measures of sweeping or novel change,' would mark a new epoch in the annals of business in this country, would be a great departure from any past experience, and would, in the judgment of your Committee, be embarking upon a sea of discovery fraught with the gravest uncertainties and perils. The seeming implication that all corporate form of enterprise is necessarily under the suspicion of being conducted in contravention of law and public welfare, and should, therefore, be brought under the closest scrutiny of a Government Trade Commission, is a new pronouncement of startling portent. Until recently the declarations of party leaders, government officials and publicists as to industrial conditions needing correction in the interest of the public welfare have been confined to business organizations seeming to have at least the potentiality of operating in restraint of trade, enjoying undue privilege or imposing unfair conditions. Now for the first time, the idea is suggested that all business of whatsoever nature conducted under corporate form shall be brought under the most exhaustive and complete scrutiny of its most intimate and personal affairs by a commission which has practically no other powers than those of investigation. It is indeed a serious matter when the framers of legislation, being the elected representatives of the people in Congress, should seem to indicate that in their minds all those conducting industrial enterprise are less honest, less fair and less public-spirited than those who are drawn into public life to frame and administer the laws."

The Committee concedes that coincidently with the remarkable industrial and business development of the country there "have been woven into the fabric forms of cooperative endeavor which have resulted in potentialities not now regarded as favorable to the public welfare, and in some cases practices always condemned by the common law and abhorrent to men of high character" have been just cause for governmental action and regulation. It is pointed out, however, that in some other countries with equal standards of civilization and morals, with equally great business and social interests, and with equally scientific and efficient governments, some of the very things which in this country are regarded as opposed to public welfare and to be prohibited, are promoted and advocated under government regulation and influence as the most efficient means of contributing to the industrial interests of all their people, and that with those countries we have to compete for the foreign commerce of the world. "But," says the committee, "whether their fundamental policies agree or differ with policies which have now become well-defined in this country, nowhere has the spirit of paternalism stretched out its arm in response to any public demand to embrace or to limit the freedom of individual initiative and liberty in the pursuit of happiness. . . . To shackle the genius of this country, to limit individual freedom and initiative within the confines of parental government direction other than the well-defined limits now understood and recognized as inconsistent with moral law, modern ethics, and the public welfare, would be to set brakes upon the splendid spirit of our people by which all our achievements have been inspired, if not indeed to break down the march of progress, and to force us to the rear in that international contest for the world's business by which alone this country can continue to grow and reach the fruition of which there has heretofore been such ample promise."

The Chamber of Commerce committee concludes its report with a recommendation that the Chamber urge upon the President and upon Congress "that ample time be given for the consideration and discussion of these new proposals by all the people of the country, that provision should be made for taking testimony from business men and business organizations throughout the country whose activities prevent their appearing at Washington to express their views, and that whatever legislation may be formulated, action thereon be deferred to a later session of Congress, in order that there may be sufficient time for a clear apprehension and thorough discussion and a complete expression of opinion throughout the country, to the end that what shall finally be determined upon may be the product of mature judgment, and may be likely to

inure to the benefit and not to the disadvantage of the interests of all the people."

The Chamber of Commerce committee's cogent and forceful statement certainly makes a case for mature deliberation and discussion in Congress before any legislation vitally affecting the business interests of the country is enacted. Having passed through the travail of the Sherman Act and fairly adjusted itself to that legislation, the business of the country can ill stand the strain of new and even more drastic enactments. Certainly if any further legislation affecting the business interests of the country is to be enacted it should be done with understanding and sympathy and not in the belligerent and inquisitorial spirit that has characterized so much of the legislation of the past.

LAWYERS OF YESTERDAY AND TO-DAY.

UP to some forty years ago, for over two centuries the type of lawyer, his office, education, training, professional experience, and character of employment remained very much the same. He was essentially American, with a slight admixture of foreign elements, which, however, were a very small percentage of the whole. He was also distinctly and purely professional as distinguished from commercial. There were practically two classes of lawyers—the office lawyer engaged in real estate, conveyancing, settlement of estates, drawing wills and contracts; and the litigating lawyer, whose business was in common law and commercial cases and equity suits, with a sprinkling of actions for personal injuries. To these might be added as a third class the admiralty and patent lawyers. Since that time altered social, economic and industrial conditions have in the process of evolution, in our large cities at least, brought about marked and important changes in the professional characteristics, and in the methods and standards, of the present-day members of the bar, which, combined with the larger professional emolument to be derived from what may be termed "commercial activity," have resulted in such a transformation that the lawyer of forty years ago would scarcely recognize his professional brother of to-day. What these changes are from which has been evolved the modern lawyer, and the factors which have been influential in his production, particularly in the city of New York, Theron G. Strong, Esq., has, in recent work just published, essayed to tell.* And he has done his work well. Himself a distinguished member of the bar of the great metropolis, one of a long line of eminent jurists and lawyers, and more or less closely related to many others of national prominence, chief of whom was Justice William Strong of the Supreme Court of the United States, Mr. Strong was, moreover, while engaged in an active practice extending over forty years, brought more or less intimately into personal contact with most of the leading personages on the bench and at the bar, and so by virtue of his family connections, his long experience, and his business and personal associations he has had exceptional opportunities of noting and judging the trend of the times. The result of his observations he gives us in the pleasing style of the familiar essayist; and furnishing us as he does with a store of personal recollections of many of the great legal luminaries of the last half century, his words have unusual interest and charm.

Two factors of prime importance in the production of the lawyer of to-day as distinguished from the lawyer of forty years ago, Mr. Strong tells us, have been the influx of foreigners into the ranks of the profession and the incursion of the money-making power into the domain of the lawyer. Up to 1870 the bar of the city of New York was essentially American. Following that year a transition began. While there had been previously a goodly number of Irish lawyers and they became more numerous, their number increased by no means in the same proportion as that of other races. The Jewish lawyers seemed then, he says, to be few in proportion to the whole, but their increase since has been extraordinary—so much so as to make it appear that their numbers are likely to predominate, while the introduction of their characteristics and methods has made a deep impression upon the bar as it is to-day. Germans also, but in fewer numbers, and Italians in larger numbers than the Germans, have had their influence in the transition which has taken place. The Jewish lawyer has almost completely absorbed the large volume of commercial and bankruptcy practice; the Jews, Irish and Germans are employed in large numbers in the prosecution of negligence cases, while Italians are closely identified with the professional work which the tremendously increasing number of Italians has produced. But the second factor has been much the more potent, and has well-nigh revolutionized the practice of the law. Says Mr. Strong, "It was hardly to be expected that the possibilities of generous money returns from an effective organization in which business activity, in one form or another, involved professional service by the trained lawyer, should escape the avaricious eyes of purely financial interests. The result is that in several directions professional work, formerly distributed among lawyers, has been almost completely absorbed by corporations combining the transaction of ordinary business with the performance of legal services incident to the same. No code of ethics interferes with their active solicitation of business, nor from advertising extensively for the purpose of attracting patronage. They are at liberty to employ agents to solicit business and to hold out inducements, pecuniary and otherwise, and in short to employ all sorts of commercial methods to induce the placing of business in their charge." A most striking instance of the change in this respect relates to real estate. Until thirty years ago, all of the business connected with titles to real estate was transacted by lawyers, and in every firm of considerable importance one member of it, at least, devoted himself to the department of real estate, and some offices were almost exclusively occupied with it. Now probably four-fifths of the work of this description is performed by title guarantee companies, who have also found lucrative employment in what are known as "condemnation proceedings." Moreover they have from time to time enlarged the scope of their business operations, until they now combine with their real estate business that of the ordinary trust company, having power to act as guardian, executor, trustee, receiver, etc., and some of them even offer to prepare wills without charge, if appointed executor. Other instances of absorption of the lawyer's practice are furnished in the organizing of corporations for business purposes by other corporations formed definitely for that purpose and for the purpose of attending to the various details of corporate management necessary to be observed in complying with the laws under which corporations are organized, and in the defense of negligence cases by employer's liability insurance companies, which as incidental to their insurance against liability for accidents of every description undertake to defend a policy holder in case of a claim for damages.

*Landmarks of a Lawyer's Lifetime. By Theron G. Strong. Dodd, Mead and Company, New York, 1914.

It has been well said that the young lawyer needs "a brain of iron, a seat of lead, and a purse of gold to buy books with" if he would attain success. In this respect at least, Mr. Strong sees no change. Thus he says: "The beginning of the modern lawyer, so far as his introduction to practice is concerned, is much the same as it always has been. Like every other employment of lasting value there are the long years of preparation and patient waiting, the long hours of hard work, small compensation, and little pay, until a foothold is secured to climb to professional eminence."

It is a wise old saying that "a good settlement is better than a poor lawsuit." But while the ability to conduct a business negotiation successfully has always been a highly esteemed qualification of lawyers, Mr. Strong notes that it was never more important than at present. Business men at the present day want skilful adjustment of their business controversies and complications. Litigation is often so slow and expensive that it does not pay, even with the most favorable result, and this has led to arbitration committees in connection with all the mercantile exchanges. Again there are the large combinations and consolidations of business interests and the reorganizations with conflicting sets of security holders which require skilful handling by able negotiators. This has given rise to a large array of able lawyers of this particular class, some the most flourishing practitioners in the profession. As illustrative of the spirit of litigation as distinguished from the spirit of settling, Mr. Strong gives an anecdote related to him of chief Judge Church by Judge Noah Davis: "When," said the latter, "we were partners in Albion, under the name of Church & Davis. Judge Church was the litigator, while I was the settler, and when Judge Church was leaving Albion to assume the office of lieutenant-governor, to which he had been elected, he was afraid that I, during his absence, would settle all the cases we had in the office, and he took my hand and looking at me earnestly, said, 'Now, Noah, I am going to leave you in charge of the business, quench not the spirit.'"

The absence of accomplishment in oratory is lamented by Mr. Strong as one of the greatest defects in the young modern lawyer, while he points ruefully to the relation of the modern lawyer to his clients as contrasted with that of the lawyer of older times. Says he, "The old-time lawyer occupied a very important and dignified position. With the clergyman, he was a man of intellectual culture and was treated by everybody with deference and respect. He was the leading personage in the community, and was called upon all occasions where intellectual cultivation was necessary in producing an appropriate oration or a written address or petition. . . . Any one familiar with the old-time prints will recognize the almost reverential deference in which the lawyer was held, being often represented as occupying a dais, an obsequious and apparently awestruck client approaching him, the lawyer's manner dignified and patronizing, and his general demeanor indicating the conferring of a favor. This relation between the lawyer and his client existed to a great degree until the early days of my professional life, but since then it has undergone a complete and marvelous change. The advent of the captains of industry, the multi-millionaires, the mighty corporations and the tremendous business enterprises, with all the pride of wealth and luxury which have followed in their train, have reversed their relative positions, and the lawyer, with a more cultivated intellect than ever and as worthy of deference and respect as formerly, is not treated with the deference and respect of early days. This is accounted for to some extent by the keen competition which exists in the profession, placing the lawyer in the attitude of reaching out for retainers, instead of being regarded as conferring a favor by accepting them. The lawyer no longer receives the obsequious client hat in hand, but is subject to the beck and nod of the great financial magnate, who, whenever he desires to see his lawyer, 'sends for him.' It would never do for the lawyer who values his practice to insist that his client should call upon him, instead of he calling upon his client."

Mr. Strong observes that there is also a marked decline in manners, especially in the courts, presenting a striking contrast with those of earlier days. This he illustrates by an incident which occurred on the argument of a motion where one of the lawyers who was engaged therein was noted for his enjoyment of the pleasures of the table, which had given him the appearance of a rather overfed individual. His opponent was arguing earnestly, when the former interrupted with the remark: "You should have raised that point by demurrer." His opponent turned upon him with a savage scowl, and inquired: "What do you know about a demurrer? It is nothing that you can eat."

The multiplication of the reports of adjudged cases has, Mr. Strong also observes, brought about an obvious change in the profession generally. Formerly, he tells us, there were not many cases to cite, and a thorough training in the principles of the law and the ability to reason from principle was essential as the fundamental requirement of the successful lawyer. As exemplifying this characteristic he cites a remark made to him by one of the clearest headed and quickest minded as well as one of the ablest lawyers of his earlier days, Mr. Francis N. Bangs, to the effect that no man was fit to be a lawyer who could not practice law without law books. The same attitude, we are told, is what distinguished the late James C. Carter from many of his contemporaries at the bar. He argued on principle. He had somewhat of a contempt for authorities. If in arguing on principle he found that his views were supported by well considered authorities, so much the better. If, however, the result of his consideration of the case on principle was an array of authorities opposed to his view, then it was so much the worse for the authorities. But, says Mr. Strong, "the days of briefly stated and clearly expressed opinions, resting on fundamental principles, have largely departed. At present there is such an enormous body of reported decisions, that instead of resort to legal principles there is a hunt among the law books for some case which will furnish a parallel. . . . This resort to cases instead of to principles has produced a different kind of lawyer from those who, in former days, without precedents to guide them, made law on principles evolved from their own inner consciousness. The lawyer of the present day, I think, may be aptly described by the well-known expression 'case-lawyer.'"

Many interesting anecdotes concerning various judges might, if space would permit, prove of interest. As an example, however, a couple of stories concerning Judge Barnard, who it will be remembered was, as an outgrowth of the Tweed regime, impeached and convicted, may be given. One is of a lawyer who had argued before the judge in support of a motion for an injunction and, the motion not being decided, sought an interview with him after a few days to inquire when he was likely to decide it. He explained that the interests of his client made it important that he should obtain his injunction as soon as possible, and asked when a decision was likely to be rendered. Judge Barnard looking at him quizzically replied: "Well, I understand that you wish a speedy decision; if that is what you want I will decide it now; your motion is denied." The lawyer attempted earnestly to remonstrate with

him, hoping he would not decide it until after careful consideration and wished him to take all the time he desired. "Oh, well," said Judge Barnard, "you are anxious for a speedy decision and I have given it, and you know Judge Barnard never reverses himself." The other respects a lawyer by the name of Hirsch who had a remarkably deep voice of great power and resonance. He had a motion which he desired to argue in person at a time when Judge Barnard was presiding at chambers, but as he was engaged with some important business in his office, he sent over a subordinate to apply for a postponement. As the application met with considerable opposition, Judge Barnard stated that Mr. Hirsch could submit the matter without argument. "But," was the reply, "Mr. Hirsch wants to be heard on the motion; he does not want to submit the case without argument, he wants to be heard." "If that is all," replied Judge Barnard, "you just go to Mr. Hirsch and tell him to go right on with his argument in his office and that I will be able to hear him."

The evanescence of the lawyer's fame has been commented on so frequently that it has become a truism. Of course there are a few exceptions where great names loom up whenever bygone years of the law are mentioned, but, generally speaking, lawyers' names are as Keats said of his own, "writ in water." To Mr. Strong we are indebted for some interesting sidelights and noteworthy incidents in the careers of many of the great giants of the legal arena who within the past forty years have graced the bar of New York by their presence.

In 1870 William M. Evarts, the first president of the New York Bar Association, was easily the most prominent member of the bar, with possibly the exception of Charles O'Conor, and by virtue of his fame, then international by reason of his masterly and successful defense of President Johnson in the impeachment proceedings, which was largely increased during the next few years by the ability he displayed and the great triumph he achieved at Geneva in the arbitration of the Alabama claims, he was certainly the most conspicuous American lawyer. Mr. Strong's opportunities for becoming acquainted with Mr. Evarts' characteristics and legal capacity were exceptionally good, and of him he says: "In personal intercourse, Mr. Evarts was undoubtedly most engaging. His fine face would light up with an attractive smile, and his unaffected cordiality and geniality, combined with his wit and brilliance, furnished a combination of fascinating personal qualities that is rarely met. . . . During all our intercourse, which was sometimes rather close, and when he was at the pinnacle of his greatness, there was a kindliness, courtesy, absence of affectation, and a play of wit and good nature that was altogether charming, because quite unusual." Mr. Evarts, we are told, affected the long and involved sentence. These long sentences occasioned a display of wit between Mr. Evarts and Judge Noah Davis at a dinner where both were guests. A short time previous, the General Term of the Supreme Court, of which Judge Davis was the presiding Justice, had made a rule on appeal from orders, often involving matters of practice not decisive of the case, that the arguments of counsel for the respective parties should be limited to fifteen minutes each, and the court was strict in enforcing it. Among the speakers who preceded Judge Davis was Mr. Evarts, and during his speech he had indulged in one of his long and involved sentences. Judge Davis, when called upon, referred to Mr. Evarts' habit of uttering long sentences, and remarked that he understood Mr. Evarts had recently complained bitterly of the enforcement of the rule in one of his own cases, because the court had on expiration of the fifteen minutes been compelled to stop Mr. Evarts in the midst of his first sentence. This of course occasioned much merriment, but Mr. Evarts was equal to the occasion, for, retorting courteously, he said that the incident to which Judge Davis referred was as true as anything else of a similar character, and he could readily understand why he was stopped, because only criminals objected to long sentences. Mr. Strong also tells us that Mr. Joseph H. Choate told him that Mr. Evarts had a very engaging personality, and was most agreeable as an associate, but, he added, although a hard worker, Mr. Evarts did not resent it at all if other people did as much of his work as possible. While he was famous as a jury lawyer, says Mr. Strong, "it was before appellate tribunals that Mr. Evarts was at his best, and I think he must have felt that his greatest power as a lawyer was in this direction. He did not seem to rely so much on his printed briefs as on his oral arguments. It was then that he expected to bring conviction to the mind of the court. He was evidently not one of that considerable class of lawyers who suppose an extended and exhaustive printed brief is the best means of convincing a court. He seemed to regard his briefs as serving to refresh the mind of the court concerning his oral argument, instead of treating his oral argument as a mere introduction to his brief. I suppose it must have been a recognition of his power in an oral argument which led him, alone among all the counsel at the Geneva Arbitration, to apply for and obtain an opportunity to present his views orally, which he did with marked success, Sir Roundell Palmer of Great Britain and Caleb Cushing and Morrison R. Waite of the United States submitting written arguments."

About 1870, Mr. Charles O'Conor was as a lawyer pure and simple pre-eminently the head of the bar of the State of New York, and probably of the United States, with the possible exception of Benjamin R. Curtis of Boston, formerly a Justice of the Supreme Court of the United States. Of him Mr. Strong says: "His progress at the bar was slow, and his distinction was a triumph of intellect. He was not by nature, temperament or art a jury lawyer, having none of the personal magnetism to attract juries, or the methods used with them by skilful advocates, and yet it is by no means true that he was not a successful jury lawyer. On the contrary, some of his great triumphs were before juries, but his greatest were appeals to reason before appellate tribunals. He had little outward personal charm, although often described as kindly and genial in informal and intimate social intercourse. No one could look upon his fine intellectual face and domelike forhead and fail to be impressed with the stamp of intellectuality. He had, moreover, no graces of oratory; his manner was angular and scholastic, with little gesticulation, generally unsympathetic and unemotional, and his voice was hard and rasping. He was often sarcastic and bitter, but there were vigor and energy, united with a choice diction and compelling reason, which would carry one along irresistibly until no other conclusion than that which he reached seemed possible. His foundations of power were his wonderful logical faculty, and his vast knowledge of the law, from which he illuminated every subject with clearness and accuracy of statement until it seemed as though nothing could be said to gainsay him." Mr. Strong tells us that an eminent lawyer related to him how on the return from Albany of the counsel engaged in the famous case of the New York & New Haven Railroad Co. against Schuyler, when the train stopped late at night at the Harlem River, Mr. O'Conor, against the remonstrances of his associates, insisted on leaving the train and walking, at some risk of personal danger, several miles across the fields to his home. This remonstrance was

because of the numerous deeds of violence which had occurred in that locality, infested at the time with desperadoes. In fact, several burglaries had occurred in houses of his neighbors; but he put all remonstrance aside, remarking that it was true that there were desperadoes and that there had been burglaries, but he was certain that neither desperadoes nor burglars would harm him, as his servants would be sure to warn them against attacking him "because," said he, "my servants actually think I am the devil." We are told that Mr. O'Conor had a grim humor when something occurred to call it forth; but this was rare. An instance of it is related when happening to meet Mr. Ogden Hoffman, he inquired where he was going and the reply was, "To Brother ———'s funeral; are you going?" Mr. O'Conor had not been on friendly terms with the deceased and he responded, "No, I think not. But, on second thought," said he, "I think I will go, for I feel sure that Brother ——— would have taken great pleasure in being present at mine." An instance is also given of Mr. O'Conor's sarcasm in dealing with a witness who, in justification of his conduct, repeated with great frequency during his testimony as to certain of his actions, that "they were under the advice of counsel." In response to a question the witness stated a fact and added, "I did it under the advice of counsel, but after doing it I actually cried." "Pray," said Mr. O'Conor, "did you also *cry* under the advice of counsel?"

It is doubtful if any lawyer has ever been employed more largely in cases of national importance than was Mr. James C. Carter. He was employed as counsel in cases of the greatest magnitude, such as the Income Tax cases and the Behring Sea controversy, and his opinion was constantly sought by the largest financial interests. It is well known that President Cleveland seriously entertained the idea of appointing Mr. Carter Chief Justice of the United States, the one serious obstacle to his selection being the doubt whether his physical condition was such as to permit him to discharge the duties of the position. Uncertainty as to this led President Cleveland to select Chief Justice Fuller although subsequent events abundantly proved that Mr. Carter would have been entirely equal to the duties of the office. Of him Mr. Strong says: "The impression that Mr. Carter made upon me was of one who, without intellectual brilliancy, gifts of genius or especially attractive social qualities, had, by remarkable force of character, diligent study, unremitting industry and an assiduous cultivation of his natural powers, won his way to eminence in his profession and to the respect of all who knew him."

Many of the lawyers of great prominence, as George F. Comstock, to whom of all the lawyers he has met Mr. Strong says he would give the first place, John K. Porter, the prosecutor of Guiteau the assassin of President Garfield, Francis N. Bangs, Aaron J. Vanderpoel, one of the busiest lawyers in New York, Stephen P. Nash, Frederick R. Coudert, William Allen Butler, who furnished an attractive combination of the poet and the lawyer, Theodore W. Dwight, the great instructor in Columbia Law School, and William A. Beach, to whom an opponent in warning the jury against being misled by his arts and eloquence paid him the doubtful compliment of being "in the whole realm of sexual litigation, without a peer and without a rival," are also treated in most fascinating fashion; but we must hurry by.

Of one other lawyer only will we speak, William F. Howe, of the notorious firm of criminal lawyers "Howe and Hummel," as without a mention of him recollections of the bar of New York city within the past forty years would be entirely incomplete. Of him Mr. Strong says: "Howe has no counterpart at the bar to-day, and I have never heard or read of any lawyer who was such a remarkable combination of eccentricity of dress and adornment, of dramatic power as an actor, of tremendous force, remarkable shrewdness and cunning, and commanding ability in defending criminals. Although at the present day his methods might prove to be out of place, there can be no question that for thirty years he was one of the most interesting and successful figures at the bar." Howe and Hummel, Mr. Strong informs us, were individually the antipodes of each other. Howe was of immense proportions, although of moderate height, while Hummel was correspondingly diminutive, and very short in stature. They presented a striking contrast, and when they appeared in each other's company their disparity of appearance was so marked as to attract universal attention. So far as Mr. Howe was concerned we are told there was never attached to him any disrepute, although undoubtedly, dealing as he did with his special line of cases, he was accustomed to take advantage of every technicality, and may, at times, have been thought to run close to the border line, beyond which a not very high standard of professional ethics would permit him to go. This phase of Mr. Howe's character is illustrated by a remark made to Mr. Strong by Judge Van Brunt: "Mr. Howe," he said, "was the soul of honor, if you put him upon his honor; but the moment you lost sight of this element and treated him upon the basis of a keen-witted lawyer, at liberty to take advantage of every technicality which the law afforded, he was quite a different individual." Mr. Howe's dress, we are told, was of the most unprofessional and gaudy character. In the course of a trial his change of garments was a marked feature. Every day witnessed a new and striking effect. His personality was always largely in evidence, and the change of garments was for the purpose, as it seemed, of attracting notice and arousing interest. In his accoutrements he looked like a prosperous saloonkeeper or a successful gambler, but he was neither of these, and was, in fact, the able, devoted, and successful advocate. He had a powerful and resonant voice, a remarkably vivid imagination, and was picturesque and powerful in a narration of facts. His imagination enabled him to introduce probable facts and circumstances, clothing the case in a garb so attractive that it exerted a tremendous influence upon the average juror. In addition to this, he was an adept in all the by-play of a trial, and his concluding address to the jury was characterized by dramatic power and tragic interest, which, with his natural aptitude for acting a part, was calculated to create a powerful impression. As an illustration of Howe's methods Mr. Strong recalls his famous defense of Ella Nelson, who was indicted for having shot the man who played her false. It seemed to be a clear case. She had fired the fatal shot and her motive was revenge. The District Attorney thought that conviction was certain and he refused to permit her to plead guilty to murder in the second degree. Mr. Howe had little on which to base his defense except the dreadful wrong which she had suffered, the overpowering impulse which led her to the act, and the overwrought feeling of a broken heart. During his address to the jury the prisoner was seated next to him, heavily veiled, her head bowed in her hands in uncontrollable grief. In the midst of his impassioned appeal, he wheeled around, seized her hands, drew them apart, and held her arms so extended that her features were exposed to the jury, exclaiming: "Look on those features proclaiming a broken heart." His sudden action frightened her, and her face of ashy hue, deluged with tears, produced the desired effect, and a sympathetic jury, overcome with emotion, acquitted her.

Much more information of general interest and value to the

lawyer is strewn through the pages of Mr. Strong's book. He writes from large experience, keen observation, and sound judgment. But, as is the case with most attempted reviews within the limits of a short article, but scant justice can be done. To appreciate the full merits of the work, the original should itself be read.

C. E. P.

MEXICO AND THE MONROE DOCTRINE.

The position as to the United States and Mexico is of interest to students of international law, as the outcome of the development of the Monroe Doctrine and the assertion by the United States of its primacy or overlordship in the New World. That position was asserted and maintained when in the boundary controversy between Great Britain and Venezuela in 1895 the right of arbitration, on which the United States insisted, was admitted and recognized. The nature of the concession was not misunderstood by Great Britain, as appears from the following paragraph in a leading article in the *Times* of the 19th Nov. 1896: "From the point of view of the United States, the arrangement is a concession by Great Britain of the most far-reaching kind. It admits a principle that, in respect of South American Republics, the United States may not only intervene in disputes, but may entirely supersede the original disputants and assume exclusive control of the negotiations." The presentation of the recent note to Mexico is an assumption by the United States in the New World of the predominant position of the Great Powers in the Old World. Professor Lawrence has recently admitted as a matter of theory that "the Great Powers of Europe, as they are called, have gradually obtained such a predominant position as to render untenable the proposition that there is no distinction between them and other sovereign states, and the position they hold in Europe is held by the United States on the American continent. . . . International law gives the Great Powers no more right in their individual capacity than the smallest and weakest of their fellows. But collectively they act on the questions over which they have gained control pretty much as a committee of a club would act in matters left to it by the rules of the club. . . . If it be true that there is a primacy in America, comparable in any way with that which exists in Europe, it must be wielded by the United States and the United States alone. There is no room for that machinery of conferences, congresses, and diplomatic communications which play so large a part in the proceedings of the Great Powers. The supremacy of a committee of states and the supremacy of a single state cannot be exercised in the same manner. What in Europe is done after long and tedious negotiations and much discussion between the representatives of no less than six countries can be done in America by the decision of the Cabinet discussing in secret in Washington." Leaving the Monroe Doctrine entirely out of view, the note of the United States will probably be regarded as justifiable under the generally recognized principles of international law.—*Law Times.*

"The Paternal Theory of Government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and the duty of government." Brewer, J., dissenting. Budd *v.* New York, 143 U. S. 551.

POINTS IN LEGAL ETHICS.

From the New York County Lawyers Association Committee on Professional Ethics.

Question No. 51. There are some collection agencies in town which are incorporated and which solicit bills for collection. It is their custom to turn over some of them to lawyers for suit. In such cases the collection agency always wishes to deal with a lawyer as if it were his client and wishes collections remitted to it instead of directly to the creditor. In your opinion, is not that method of doing business improper? This question arises frequently and is quite troublesome because, so far as I know, there has been no adjudication of the matter.

Answer. In the opinion of the Committee, the patron of the collection agency is the client, but the Committee sees no impropriety in the lawyer's complying with the wish of the collection agency in remitting to it; assuming (as the Committee does) that the agency is the authorized agent of its patron to deal in his behalf with the lawyer.

Question No. 52. First: When a judge of a court of review or of last resort has a dispute which he wishes to litigate, may he, without impropriety or a breach of the ethics of the profession, prosecute his suit in a court from which an appeal or writ of error lies to the court of which he is a member? Or should he, before bringing suit, resign from his office as judge?

Second: When the judgment in such case comes before the court of review or of last resort, of which the plaintiff is a member, is it sufficient to meet the requirements of the ethics of the profession, or for the due, proper, and impartial administration of the law, for the reviewing court in deciding the case merely to say that the plaintiff in the case did not sit? Or, if not, what is the proper action?

Answer. First: In the opinion of the Committee, the judge may properly prosecute his suit without resigning his office.

Second: The reviewing court could, it seems to the Committee, be fully expected to deal properly with the case. The plaintiff should, of course, not sit as a judge in his own cause, but this does not disqualify his colleagues, who should not (and doubtless would not) permit him to participate in their deliberations or influence them in any way whatever. It does not seem to us that any formal action or comment of any sort by the court upon the judge's disqualification is necessary. A proper precaution to avoid possible, but not probable, misunderstanding would be an informal announcement that the disqualified judge did not participate in the deliberations or action of the court.

In the opinion of the Committee, the judge should not personally try or argue his own cause.

Question No. 56. I invite the expression of the opinion of the Committee in respect to the following suggestion about which I have been recently consulted:

A receiver and his counsel agree to divide their fees, i. e., the receiver to pay to his counsel one-half of the commissions which the court might allow to him, and the counsel to pay to the receiver one-half of the amount which the court awarded to him as counsel for the receiver.

Query: 1. Was this agreement void as against public policy?
2. If not void, was it proper according to proper ethics?

Answer. In the opinion of the Committee, the agreement is contrary to the proper rules of professional conduct, and it is probably illegal.

Cases of Interest.

Slovenly and Ungrammatical Indictment as Constituting Reversible Error.—The case of People *v.* Pindar, (N. Y.) 104 N. E. 133, is authority for the proposition that an indictment is not subject to dismissal merely because it is slovenly and ungrammatical. The Court of Appeals in that case said: "The draftsman to whom the district attorney of Otsego county intrusted the preparation of the indictment in this case produced an exceedingly slovenly and ungrammatical pleading, but having regard to the provision in section 684 of the Code of Criminal Procedure to the effect that no error or mistake in any criminal pleading is to be deemed to invalidate it unless the defendant has been thereby prejudiced, we agree with the learned Appellate Division that the indictment may be upheld."

Liability of Municipality for Death of Prisoner in Lockup Destroyed by Fire.—In Nichols *v.* Town of Fountain, (N. C.) 80 S. E. 1059, it was held that a small rural village was not liable in damages for the death of a prisoner confined in the village "lockup," due to a fire which destroyed the building, although it failed to employ a guard or watchman to look after the prisoner and provide for him a means of escape in case of fire. The court said: "In respect to jails and 'lockups' the municipality is held only to the duty of properly constructing and furnishing the prison, and in exercising ordinary care in providing the usual necessaries for the prisoners. It is held that, if the municipal authorities comply with these requirements, the municipality is not liable in damage for the negligence of its officers to properly care for and administer to the wants of the prisoners. . . . The same principles of law are recognized in England, and in a recent case brought on appeal before the Privy Council the judgment of the Supreme Court of Philadelphia is affirmed, and it was held that a small rural township is not bound to have a watchman constantly on duty to guard against the risk of fire in a wooden cell used for the custody of prisoners, and that the township was not liable for the death of a prisoner in such jail, caused by fire originating in the cell. McKenzie *v.* Chilliwack, Ann. Cas. 1913 B, 1278. This case is on 'all fours' with the one we are considering."

Right of Husband to Curtesy in Land Which Wife Had Contracted to Sell at Time of Marriage.—In Dooley *v.* Merrill, (Mass.) 104 N. E. 345, suit was begun by bill in equity to compel the female defendant to perform specifically an agreement to convey certain real estate. After issue had been joined, and on the day before the trial upon its merits, the original defendant and one Merrill were married, the latter having notice of the pendency of the suit and of the plaintiff's claim in it. He subsequently was joined as defendant. The only question presented was the correctness of a refusal to rule, in accordance with the request of the defendant husband, that the plaintiff was not entitled to any decree against him, and that the bill be dismissed as to him, it having been found as a fact that the defendant wife, before her marriage, executed a binding agreement to sell the real estate to the plaintiff, which she refused and continued to refuse to perform. It was held that the refusal so to rule was correct. Chief Justice Rugg, writing the opinion of the court, gave the following reasons for its decision: "It is well settled that when by the terms of a binding contract a conveyance of land ought to be made, equity will regard that done which ought to be done, and, if the holder of the legal title refuses to make conveyance, will treat him as trustee for the purchaser ready and able to perform his part of the contract. This equitable obligation will be enforced not only against the holder of the legal title, but against others taking an interest in the legal title with notice, and adequate remedy will be afforded to carry out this principle. . . . Logically this doctrine applies to cases where an unmarried man or woman, having made a binding contract to convey land, after marriage refuses to make such conveyance, with the result that such subsequent spouse would acquire no right either of dower or curtesy in the land described in the agreement. Practical justice requires such an extension. Under circumstances analogous to those in the case at bar it has been applied frequently to the extinguishment of a claim for dower. . . . In reason the principle is equally binding to extinguish any claim by one who, subsequent to the agreement, has become husband of the woman executing the agreement whereby she has become bound to make conveyance."

Liability of Railroad for Death of Passenger to Which Bright's Disease Was a Contributing Cause.—That a street railway corporation, made liable by statute for damages for the wrongful death of a passenger, is not relieved from that liability merely because the death was hastened by an incurable disease with which the passenger was at the time afflicted, is the holding in Wiemert *v.* Boston Elevated Ry., (Mass.) 104 N. E. 360. There death occurred seven months after the accident and was hastened by Bright's disease. The court said: "At common law, on an indictment for causing the death of another, it was held that death was caused when by the act of the defendant it was hastened, or in other words when it occurred sooner by reason of the act than otherwise it would have occurred. As said by Bigelow, J., in Com. *v.* Fox, 7 Gray, 585, 586, which was an indictment for homicide: 'In the present case, this rule of law will be sufficiently complied with, . . . if the jury are satisfied, on the evidence, that an assault and battery were committed on the deceased, . . . and that thereby [her] death . . . was hastened, so that it took place sooner by reason of the assault and battery than it would have occurred in consequence of her sickness alone. In such case, the assault and battery were the efficient cause of death. As death is appointed to all the living, and must come to all sooner or later, every act of homicide only hastens the inevitable event. The law therefore does not permit a party charged with murder to speculate on the chances of the life of his victim, or to endeavor to apportion his own wicked act by dividing its effects with the operation of natural causes on the body of the deceased.' It is plain that if the proceeding in the present case had been by way of indictment this rule of the common law would have been held applicable, and it would have been held that if the act hastened the death then the death was caused by the act. And it is equally plain that the act for which the action of tort lies is the same as that for which an indictment will lie. The change in the nature of the proceedings does not alter the act for which the defendant is liable. As in the case of an indictment, so in that of an action of tort, the act is the same, namely, an act which hastens death or causes death sooner than but for the act it would have occurred. The defense is weakened rather than strengthened by the fact that the statute is penal."

Persons Liable for Sickness of Another Due to Eating Tainted Meat.—An interesting case recently decided by the Kansas Supreme Court is Malone *v.* Jones, 139 Pac. 387, which

was an action to recover damages for the sickness of the plaintiff caused by eating tainted meat at the defendant's home. The facts were as follows: Henry Jones, one of the defendants, lived with his father and mother, the other defendants, on his father's farm, and was carrying on the farming operations. He arranged with his parents to board his hands. The plaintiff was employed by him as a laborer for stipulated wages and board. The father purchased, and the mother cooked and served, meat which, when put upon the table, was tainted and unwholesome. The evidence tended to show that the bad condition was apparent when the meat was cooking. The plaintiff became sick by partaking of it. Neither the father nor son knew that the meat was tainted until it was on the table. It was held that the son was liable for negligence in providing unwholesome food, and that the father and mother, having jointly undertaken to provide the board, were equally liable for negligently cooking and serving it. The court said: "It will be observed that the board was to be furnished at the family table, and Henry's liability is not different from what it would have been had he furnished it by the help of servants in the ordinary way. . . . While there was no contractual relation of employer and employee between David Jones [the father] and wife and the plaintiff, they were not relieved from the duty of exercising reasonable care in providing his food. Their liability springs from the wrong, and reaches to any person whom it might be reasonably foreseen would be injuriously affected by it. This principle is elaborately considered in an opinion by Chancellor Pitney in Tomlinson *v.* Armour & Co., 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. N. S. 923. In that case the declaration charged the defendant, a meat packer, with having negligently and carelessly placed unfit and unwholesome meat in a can which, in the course of its business, was sold to a retail dealer, of whom the plaintiff purchased it, and, having partaken of it, was made sick. On a demurrer the question was raised whether, in the absence of a scienter, any liability of Armour & Co. appeared. The opinion discussed the question of implied warranty, and, assuming that there was none, nevertheless held that the defendant was liable, because of the duty resting upon the manufacturer to exercise care that the contents of the cans which it put upon the market, to be sold for food and for domestic use, were in fact food fit to be eaten. The same principle applies here with equal force. David Jones and his wife provided and prepared food for those sitting at their table, and owed to them the duty at least to exercise reasonable care in this service, whether the persons for whom the food was intended were their employees or not. It was not necessary to the liability of David Jones that he should actively participate in cooking or serving the meat. He was engaged jointly with his wife in furnishing the board, and is equally liable with her for negligent performance of the duty so undertaken. As liability does not depend on employment, it is immaterial whether the plaintiff was employed by Henry Jones alone or by all the defendants."

RIGHT OF PUBLIC TO HUNT ON NAVIGABLE WATERS.—The right of the public to hunt on navigable waters, the title to the bed of which is in private parties, is a question which the Supreme Court of Wisconsin was called upon to decide for the first time in Diana Shooting Club *v.* Husting, (Wis.) 145 N. W. 816, and the answer was in the affirmative, the opinion of the court being in part as follows: "In Ne-pee-nauk Club *v.* Wilson, 96 Wis. 290, 71 N. W. 661, it was held that riparian owners on a meandered lake had no exclusive right to hunt thereon, and the court, obiter, said: 'The right of fishing and fowling upon such waters is in the owner of the soil which is under the water,' citing Hardin *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808, 35 L. Ed. 28, and Bristow *v.* Cormican, 3 App. Cas. (L. R.) 641. The first case does not really so hold, and the English case was based upon the doctrine that the crown had no right to nontidal waters, and that there was no right in the public to fish in such waters. In Merwin *v.* Houghton, 146 Wis. 398, 131 N. W. 838, the public right of hunting and fishing upon the navigable waters of the state was recognized and asserted, though not the direct subject of adjudication. The question there considered was the right to improve the navigability of a navigable stream, and it was urged that it should not be done, because it would take away the right of the public to hunt and fish in certain navigable channels and widenings of the stream which the proposed improvement would destroy. But it was held that the right of hunting and of fishing must, within reasonable limits, yield to the paramount right to improve the navigation of the stream. The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters, and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation. Only by so construing the provisions of our organic laws can the people reap the full benefit of the grant secured to them therein. This grant was made to them before the state had any title to convey to private parties, and it became a trustee of the people charged with the faithful execution of the trust created for their benefit. Riparian owners, therefore, took title to lands under navigable waters with notice of such trust, and subject to the burdens created by it. It was intended that navigable waters should be public navigable waters, and only by giving members of the public equal rights thereon so far as navigation and its incidents are concerned can they be said to be truly public. Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of ordinary high-water marks. When so confined it is immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation. By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristics. Lawrence *v.* American W. P. Co., 144 Wis. 556, 562, 128 N. W. 440. And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark."

LIABILITY OF OWNER OF AUTOMOBILE TO GUEST INJURED BY RECKLESS DRIVING.—In an exceedingly thoughtful opinion the Kentucky Court of Appeals in Beard *v.* Klusmeier, (Ky.) 164 S. W. 319, reached the conclusion that one who invites another to ride with him in his automobile owes a duty to his guest to exercise ordinary care in running the car, and if he indulges in reckless driving and a collision results, causing injury to the guest, he is liable in damages for the injury. The court said: "Perhaps the best reasoned opinion upon the subject is

found in Patnode *v.* Foote, decided in 1912 by the Appellate Division of the Supreme Court of New York, and reported in 153 App. Div. 494, 138 N. Y. S. 221. In that case Patnode invited Foote to ride with him in an open buggy drawn by one horse, and driven by Patnode. There was evidence tending to show that Patnode drove at a reckless speed, against Foote's protest, and that a collision with a wagon, which threw Foote violently to the ground, was the result of Patnode's careless driving. Foote having recovered a verdict for $400, Patnode appealed. In sustaining the recovery the court said: 'The defendant insists, as one of his grounds for reversal of the judgment, that his motion for a nonsuit should have been granted, because the plaintiff was his gratuitous passenger to whom he owed no duty of care. Counsel upon both sides confess their inability to find any reported decision defining the obligation of one who invites another to ride in his private vehicle toward the passenger so invited. After considerable research, we have not been able to find any such decision in this state, but we do find the case of Pigeon *v.* Lane, 80 Conn. 237, 67 Atl. 886, 11 Ann. Cas. 371, which impresses us as stating the true rule. In that case the person invited to ride in the private vehicle of another is declared to be a licensee, and the duty of the person giving such invitation is stated to be the refraining from doing any "negligent acts by which the danger of riding upon the conveyance was increased or a new danger created," and a summary of the decision is stated in the syllabus as follows: Such "licensee can recover only for the active negligence of the licensor." A person thus invited to ride stands in the same situation as a bare licensee who enters upon real property which the licensor is under no obligation to make safe or keep so, but who is liable only for active negligence. Birch *v.* City of New York, 190 N. Y. 397, 83 N. E. 51, 18 L. R. A. (N. S.) 595. The obligation of one who invites another to ride is not as great as that of the owner of real property who invites another thereon, especially for the purposes of trade or commerce, because, under such circumstances, the one who gives the invitation is bound to exercise ordinary care to keep such property reasonably safe. Duhme *v.* Hamburg-American Packet Co., 184 N. Y. 404, 77 N. E. 386, 112 Am. St. Rep. 615. Under the above principles, therefore, one who invites another to ride is not bound to furnish a sound vehicle or a safe horse. If he should have knowledge that the vehicle was unfit for transportation or the horse unsafe to drive, another element would arise, and he might be liable for recklessly inducing another to enter upon danger. These latter elements, however, are not involved in the present action, and the duty of the defendant toward the plaintiff only was to use ordinary care not to increase the danger of her riding with him or to create any new danger. It was practically upon this theory that the learned trial court submitted the case to the jury.' We think the rule there stated is the correct rule, and that appellant's duty to the appellee was to use ordinary care not to increase the danger of her riding with him, or to create any new danger. In the case at bar, appellant is charged with creating a new danger by his fast and reckless driving. As said in the Foote Case, supra, one who invites another to ride is not bound to furnish a safe vehicle, or a safe horse, or a safe automobile; but, if the driver fails to use ordinary care in driving the automobile, he thereby creates a new danger for which he is liable. In order to free themselves from the charge of reckless driving, chauffeurs should never forget that juries usually look upon an automobile as an inherently dangerous contrivance that is likely to go at an unreasonable speed, at any time, if not repressed."

Liability of Railroad for Injury to Passenger Due to Fall of Suit Case from Rack.—The rule is laid down in Rosenthal *v.* New York, etc., R. Co. (Conn.) 89 Atl. 888, that the furnishing of racks in passenger cars for luggage, invites passengers to use them to the extent of their apparent limit of safety, and imposes on the railroad company, when the racks are so used, the duty of operating its trains so as not to endanger passengers sitting in the seats underneath. The facts in the case were as follows: The plaintiff with two friends was playing cards in the smoking car of a train running from New York to Hartford, when it was suddenly stopped a short distance before reaching the New Haven station, and at the same moment a suit case fell from the rack over the seat in which the plaintiff was then sitting and struck the plaintiff on the head, inflicting an injury which then appeared to be slight, but from which serious consequences afterward developed. The plaintiff's friends had placed two suit cases in the rack, one over the other, before the train started from New York. The plaintiff made a twofold claim: First, that the suit case was thrown from the rack by a train stop so unusually sudden and violent that, unless it was satisfactorily explained by the defendant, the jury might reasonably infer therefrom negligence in the operation of the train; and, second, that if the stopping of the train was not unusual, and the fall of the suit case was occasioned in whole or in part by the ordinary motion of the train, the defendant ought to have foreseen the danger and protected the plaintiff against it. The twofold claim of the plaintiff was not favored in the trial court, where a judgment was rendered for the defendant, but on appeal the claim was sustained and a new trial ordered. The court said: "A passenger cannot be expected to know the cause of an abrupt stop resulting in injury, and it is not asking too much of the defendant railroad that it should be put upon its explanation by evidence showing that the stop was uncommonly abrupt, and that it produced a physical consequence in itself unusual, from which the plaintiff's injury resulted. . . . It is said that the doctrine of res ipsa loquitur has no application to this case, because the suit case which caused the injury was not under the control of the defendant. But we are not inclined to follow the suggestion contained in some of the New York cases; that the railroad company is bound to exercise only a reasonable degree of care in protecting its passengers from the risk of luggage falling from racks provided for its stowage. The furnishing of racks for that purpose invites passengers to use them to the extent of their apparent limit of safety, and imposes on the railroad, when the racks are so used, the duty of operating its trains so as not to endanger passengers sitting in the seats underneath such racks. If the defendant maintained racks of such construction that there was a risk not apparent to the ordinary passenger in putting one suit case on top of another, it should have given notice that it was dangerous to do so, either before the train started, or at some time during the hour and a half after the train started and before the accident happened. If any evidence had been offered from which the jury could reasonably have found that the rack in question could not safely hold two dress suit cases, one on top of the other, we think the jury would also have been justified in finding that the defendant was negligent in giving no warning of that fact, for it is clear that a passenger sitting in a seat provided for that purpose is not bound to maintain a lookout to protect himself against the danger of falling luggage, unless perhaps the danger is so obvious that it ought to attract the attention of any ordinarily observant person. But the evidence as offered pointed the other way,

and indicated that the suit case in question was securely stowed in the rack before the train started, and there was no evidence that it was in fact dislodged, or was liable to be dislodged, by the ordinary motion of the train. Under this condition of the testimony the jury might reasonably have found that the proximate cause of the accident was the unusually abrupt train stop; and this, as already stated, is a cause peculiarly under the control of the defendant's servants."

RIGHT OF WIFE TO MAINTAIN ACTION AGAINST HUSBAND FOR ASSAULT AND BATTERY AND FALSE IMPRISONMENT.—In Brown *v.* Brown, (Conn.) 89 Atl. 889, the Connecticut Married Woman's Act was construed to authorize an action by a wife against her husband to recover damages for an assault and battery and false imprisonment, although the act did not expressly authorize an action by a wife against the husband. The court said: "By the common law the husband might restrain the wife of her liberty and might chastise her. 1 Blackstone, Com. 444. 'The law which attached such subjection to the legal status of a married woman has been abolished, but not by direct legislation; it has disappeared under the continuous pressure of judicial interpretation or indirect legislation.' Mathewson *v.* Mathewson, 79 Conn. 23, 27, 63 Atl. 285, 287, 5 L. R. A. (N. S.) 611, 6 Ann. Cas. 1027. It is now as unlawful for him to beat or falsely imprison his wife as for another to do so, and he is amenable to the criminal law for such an offense. If another, prior to the recent statutes, committed these offenses against her, they were liable in an action for the injuries inflicted upon her by such torts, but the action had to be brought in the name of her husband and herself jointly; the real purpose of the action being to reduce the chose into the possession of the husband. The wife was joined, because, if her husband should die pending the suit, the damages would survive to her. 1 Blackstone, Com. 443; 1 Chitty on Pleading, 73. The common law regarded husband and wife as but one person, and the husband was that person. Being but one person, they could not contract with or sue one another. This resulted logically from the legal identity of husband and wife. If this were the present status of the parties, the plaintiff could have no action for the recovery of damages for the torts alleged. Public Acts 1877, c. 114, entitled An Act in alteration of the act concerning domestic relations, but commonly called the Married Woman's Act, established a new legal status for persons thereafter married. It took effect April 20, 1877, and is embodied in the present revision of the general statutes. The purpose and effect of the act were in question in Mathewson *v.* Mathewson, supra. In the opinion, written by Judge Hammersley, after a review of the previously existing law relating to the status of married persons, it is held that 'in enacting this law the state adopted a fundamental change of public policy;' that by it 'the unity in the husband of his own and his wife's legal identity and capacity to own property was removed, and a new foundation, namely, equality of husband and wife in legal identity and capacity of owning property, was laid;' and that since the act took effect 'husband and wife alike retain the capacity of owning, acquiring, and disposing of property, which belongs to unmarried persons.' In that action a wife had sued her husband for breach of contract. The act provides that the wife shall have power to make contracts with third persons, and it was claimed that, as it in terms gave husband and wife no power to contract with each other, such power is prohibited; but it was held that as the act 'is in the nature of fundamental legislation, it involves all the results necessarily flowing from the principle established;' that the consequences resulting from the new status established by the act were not to be prohibited by inference, unless such inference is necessary; and that the right of husband and wife to sue each other for breach of contract is one of the consequences of the new status established by the act. In Marri *v.* Stamford Street R. Co., 84 Conn. 9, 23, 24, 78 Atl. 582, 33 L. R. A. (N. S.) 1042, Ann. Cas. 1912 B, 1120, we held that, as the result of the legal status created by the act of 1877, the wife may now, by an action in her own name, recover for physical injuries tortiously inflicted upon her as fully and to the same extent as a husband may when he is the person injured, and that the wife's right of recovery for her injuries is exclusive. In that case a husband had been allowed to recover, among other things, for the loss of his wife's services caused by her injuries, and so much of the judgment as allowed him damages for the loss from such injuries was set aside. By these two cases it is established that a wife, married since April 20, 1877, may contract with her husband or other person and may in her own name sue her husband or such other person for breach of such contract; also that she has a cause of action upon which she may recover in a suit brought in her own name for personal injuries wrongfully inflicted upon her by others than her husband. If a cause of action in her favor arises from the wrongful infliction of such injuries upon her by another, why does not the wrongful infliction of such injuries upon her by her husband now give her a cause of action against him?"

AS TO THE SHIFTING OF BURDEN OF PROOF.—The learned Judge Swayze had occasion in Hughes *v.* Atlantic City, etc., R. Co., (N. J.) 89 Atl. 769, to pass on that much considered question whether the burden of proof can ever be said to shift. The facts showed that the plaintiff, a passenger in a car of the defendant, was injured by fragments of glass from the explosion of an electric light bulb in the ceiling of the car. There was no proof of the cause of the explosion; the plaintiff went no further than to testify that "probably it was a weak bulb, and the voltage might have run up on it, and of course it had a tendency to burst the globe." The trial judge, in view of the high degree of care required of a carrier of passengers, told the jury that "when an accident of this kind happens to some of the means of transportation, the law shifts the burden of proof from the plaintiff as to the explanation or showing the actual cause to the defendant, and imposes upon it the burden of making an explanation exculpating itself from negligence." The question he put to the jury was: "Has the defendant done that?" To leave no doubt of his meaning he added: "The explanation is one that you must pass upon, whether or not the burden which the law casts upon the defendant in a case of injuries, an accident of this kind, has been met. If it has, then of course the negligence that the law would infer from the proof of the facts of the accident and the nature of it does not exist, and the company would not be answerable at all." Judgment was entered for the plaintiff, which was reversed by the court of errors and appeals for the failure of the trial court to submit to the jury the question of the defendant's negligence upon the whole case. Judge Swayze, writing the opinion of the court, said: "The inference of negligence from the mere happening of the accident may be a legal inference in the sense that it is permitted by the law, but it is not a legal inference in the sense that it is required. It is true that in some cases language may be found to the effect that, under certain circumstances, the burden of proof shifts, while other cases declare quite as explicitly that the burden of proof never shifts. The seeming conflict arises from the ambiguous meaning of the words 'burden of proof'

as applied to jury trials. This ambiguity is dealt with by Thayer in two of the most enlightening chapters of a most enlightening book, well said by Wigmore to be epoch-making (Preliminary Treatise on Evidence, 353), and by Wigmore, with a somewhat different form of statement and ample citation of authorities (Wigmore on Evidence, sections 2483 and the following). In one sense 'burden of proof' means the duty of the actor, i. e., the party having the affirmation of the issue, to establish the proposition at the end of the case. In this sense the burden never shifts. The distinction is pointed out in a case cited by Thayer, of an action to recover damages for injury caused by the explosion of a boiler of a steamboat in which the plaintiff was a passenger. Caldwell *v.* New Jersey Co., 47 N. Y. 282, 290. In a second sense the expression means the duty of going forward in argument, or in producing evidence, and in this sense the burden may shift according as one side or the other has satisfied the judge that the evidence suffices to make a prima facie case in his favor. The practical distinction is well stated by Wigmore, and it is, as he says, important: 'The risk of nonpersuasion operates when the case has come into the hands of the jury, while the duty of producing evidence implies a liability to a ruling by the judge, disposing of the issue, without leaving the question open to the jury's deliberations.' Wigmore, § 2487. In applying the law to a case like the present, we think it clear that the plaintiff was bound to satisfy the jury, by the preponderance of evidence, that the defendant was guilty of negligence that caused the accident; if he introduced no evidence, or no evidence from which an inference of negligence could be drawn, it would be the duty of the judge to direct a verdict for the defendant; if he introduced evidence which permitted or required an inference of negligence, it would be for the jury to say whether they believed the witnesses, and, where an inference of negligence was permissible but not required, whether they drew that inference. The mere occurrence of the present injury did not require a finding of negligence, since the bulb may have burst from some cause beyond the defendant's control. When the judge said that the burden shifted, the context shows that he meant the duty of persuasion upon the whole case. In no other sense was the jury concerned with the burden of proof. He thereby imposed upon the defendant a duty that the law imposes on the plaintiff."

New Books.

A Treatise on the Law and Practice of Bankruptcy. By Henry Campbell Black. Pp. 1852+xxv. Kansas City, Missouri: Vernon Law Book Company. 1914.

Mr. Black, whose name appears on the title page of many standard law books, is now the author of a comprehensive treatise on Bankruptcy. This latest contribution to the subject is a scientific treatment based on the case law construing the Bankruptcy Act of 1898 and its amendments. Decisions under the earlier acts of 1841 and 1867 are also included, and there are appendices containing the general orders in bankruptcy, the official forms, the full text of the act of 1898 and amendments, and also the text of the act of 1867, which the author considers highly important for purposes of comparison in the process of interpreting the existing statute. Mr. Black says in his preface that "the general subject of bankruptcy law has engaged his study, research, and reflection for a period of more than twenty years, as his investigation of the subject began long before the enactment of the statute now in force, and the fruit of all his labors is embodied in the present volume." While there are several excellent text books on Bankruptcy already on the market, the subject is one of such vast importance, and the authorities accumulate so rapidly, that there is always a field for another, especially one written by a person so eminently qualified, and so favorably known to the profession, as the author of this latest volume.

Philosophy of Law. By Josef Kohler, Professor of Law in the University of Berlin. Translated from the German by Adalbert Albrecht, Associate Editor of the Journal of Criminal Law and Criminology. Pp. 390+xliv. Boston: The Boston Book Company. 1914.

This is Volume XII of the Modern Legal Philosophy Series, edited by a committee of the Association of American Law Schools. We have had occasion in the past to speak of the splendid work which is being done by this committee to give to English speaking legal scholars the translated writings of distinguished foreign authors dealing with legal philosophy. The present volume contains an editorial preface by Albert Kocourek, lecturer on Jurisprudence in Northwestern University, and introductions by Orrin N. Carter, a justice of the Supreme Court of Illinois, and William Caldwell, professor of logic and moral philosophy in McGill University, Montreal. Josef Kohler, the author, was born in Germany in 1849, became a professor of law at Wurzburg in 1878, and since 1888 has been a professor of law at the University of Berlin. He has written extensively, and belongs to the idealistic school of thought, represented by the great German philosopher Hegel. An interesting part of the volume is that devoted to Slavery, wherein he argues that slavery exhibits considerable economic progress, for in periods in which economic life is but slightly developed no need of slaves is felt. He says: "The household is limited in accordance with the needs of the family, and the addition of servants would mean only the increase of family cares and would make it necessary to divide the meager proceeds of industry among a greater number of consumers than formerly. It is not until there is a more developed and growing agricultural or industrial life that the need is felt of slaves as workers in agricultural or industrial pursuits. But when once this point is reached, the need of slavery is so strong that the people would risk everything in order to add to their working force in this way. Wars are carried on for the sake of taking slaves; raids are made, or people belonging to some particular class are oppressed, tormented, and driven by various economic abuses into becoming slaves and rendering a slave's obedience and service." Mr. Justice Carter commenting on this passage says in his excellent introduction: "The reading of his discussion on this subject will cause some of us to wonder less that the institution of slavery was so strongly advocated in portions of our country before the civil war. In connection with his views on slavery it is appropriate to state that his judicial ideal is what some of his critics have designated 'as an Hegelian aristocracy;' that law must be permanently ideal and educative, but cannot draw its inspiration from the masses." The author in numerous places touches questions which are pertinent to subjects uppermost with us in this country, as for example, the subject of trusts. We are satisfied that the editors of the Modern Legal Philosophy Series made no mistake in including therein this book of Professor Kohler's. We should add that Mr. Albrecht is entitled to praise for his excellent translation.

Walser's Index-Digest of Criminal Law, Evidence, Pleading, Practice and Procedure. Second edition. By Zeb V. Walser, formerly Attorney-General and Supreme Court Reporter of North Carolina, and Zenobian I. Walser of the Lexington (N. C.) Bar. Pp. 558+xlvi. Durham, North Carolina: Press of the Seeman Printery. 1913.

The book at hand is a complete digest of the criminal law contained in the decisions of the Supreme Court of North Carolina from its organization to the present time, and follows the general plan of the first edition. It is said that a reprint of the digest is not contemplated. Each subject or title has been reconstructed in this edition and greatly enlarged, errors have been corrected, omissions supplied, and a thorough revision made. The bar of North Carolina will no doubt welcome its publication, as the first edition proved very useful.

A Digest of Cases Decided in France Relating to Private International Law. By Pierre Pellerin, Licencié en droit of the University of Paris and of Lincoln's Inn (London) Barrister at Law. Pp. 135. London: Stevens & Sons, Limited. 1913.

This is a digest of what purports to be a selection of the most interesting and recent decisions rendered in France upon points of private international law in cases in which British, American and French parties have been concerned. The compiler expresses the hope that English solicitors and American lawyers will find in this concise digest some elements which may assist them when consulted in relation to proceedings to be instituted in France, or when examining points appertaining to French Private International Law. The text is in the English language, but some French legal terms and expressions for which exact English equivalents do not exist are to be found scattered through the pages. This digest is to be followed by similar digests at intervals of five years in order to keep English and American lawyers fully "au courant" with the most recent decisions in France in matters relating to Private International Law.

News of the Profession.

THE GEORGIA BAR ASSOCIATION will hold its annual meeting at Tybee, Ga., on June 18, 19 and 20.

ILLINOIS JURIST DIES.—Charles B. Campbell, judge of the twelfth judicial district of Illinois, died at Kankakee, Ill., on April 1.

APPOINTED CITY SOLICITOR.—Frank F. Dawley has been appointed city solicitor of Cedar Rapids, Ia., to fill the vacancy caused by the resignation of William Chamberlain.

FORMER CHIEF JUSTICE DIES.—Robert Moore Wallace, former chief justice of the superior court of New Hampshire, died at Milford, N. H., on April 5, at the age of 67.

DEATH OF PROMINENT MARYLAND ATTORNEY.—William Shepard Bryan, Jr., formerly attorney general of Maryland and a prominent lawyer of Baltimore, died at that city on April 3.

NEW FEDERAL JUDGE IN PENNSYLVANIA.—President Wilson has appointed Oliver B. Dickinson, of Chester, Pa., as United States District Judge for the new Eastern District of Pennsylvania.

JOINT SESSION OF BAR ASSOCIATIONS.—Further details of the joint meeting of the bar associations of Mississippi and Louisiana, held at Gulfport, Miss., on April 30 and May 1, will be given in the June issue of LAW NOTES.

QUITS APPELLATE COURT.—Judge Charles Whitney of Waukegan, Ill., has resigned from the Illinois Appellate Court, second district, on account of ill health. He still retains, however, his position on the Circuit Court bench.

APPOINTED ASSISTANT UNITED STATES ATTORNEY.—J. J. P. O'Brien, of Wheeling, W. Va., has been appointed assistant United States attorney for the northern district of West Virginia, to succeed John Marshall, of New Cumberland.

JUDGE MASTERS OF WISCONSIN DEAD.—Judge C. M. Masters, aged 73, former county judge, leading lawyer, former supreme master of the Ancient Order of United Workmen, and former Grand Master of the Masonic Grand Lodge of Wisconsin, died at Sparta, Wis., on March 14.

CHANGE IN VIRGINIA CIRCUIT COURT.—Preston W. Campbell, of Abingdon, Va., has been named by Governor Stuart to succeed Judge F. B. Hutton as judge of the Twenty-third circuit, composed of Washington and Smyth counties, and which after July 1 will embrace Scott county. The appointment was made upon the resignation of Judge Hutton, who will practice law. Judge Campbell is at present commonwealth attorney of Washington county.

PENNSYLVANIA JURIST DIES.—Judge Nathaniel Ewing died at Uniontown, Pa., on March 28, aged 66. Judge Ewing was chairman of the Pennsylvania Public Service Commission, and had previously served as chairman of the Pennsylvania State Railroad Commission and as President Judge of the Fourteenth Judicial District.

APPOINTED TO OKLAHOMA SUPREME BENCH.—Judge Stillwell H. Russell, of Ardmore, Okla., has accepted the commission recently tendered him by Governor Cruce, as member of the supreme court of the state to succeed Judge Robert Williams, resigned. Judge Russell has been judge of the Carter county judicial district since statehood.

MISSOURI LAWYER ACCEPTS FEDERAL JOB.—Charles F. Newman, an attorney of Greenfield, Mo., who was recently offered the appointment of district attorney for the interstate commerce commission, has notified Solicitor Joseph W. Folk that he will accept the place. His headquarters will be in Kansas City where the commission shortly will establish a bureau to have charge of the work of fixing the physical valuation of railroads in the eight states comprising the district.

DEATH OF FEDERAL JUDGE.—Judge Charles Andrew Willard of the United States District Court died at Minneapolis, Minn., on March 20. Judge Willard was associate justice of the supreme court of the Philippines for seven years and resigned that position in 1909 to accept the appointment of United States District Judge.

LAWYERS IN BOHEMIA.—According to the last annual report of the Bar Association of Bohemia, there were, at the end of 1913, in the Kingdom of Bohemia, with a population of 7,000,000, a total of 1305 practicing lawyers, or one lawyer for each 5364 of the population. In Greater Prague, with a population of 600,000, there were then 471 lawyers, or one lawyer for about 1252 of the population.

SPECIAL ASSISTANT OF UNITED STATES ATTORNEY RESIGNS.—B. D. Townsend, special assistant of the United States attorney at San Francisco, has tendered his resignation to the Attorney

General. Mr. Townsend has been connected with the Department of Justice since August, 1904, and has conducted a number of important cases for the Government, among them the Oregon and California railroad land withdrawals and the Southern Pacific oil land cases in Kern County, California.

Added to Harvard Law Faculty.—A new member of the Harvard Law Faculty was appointed at the last meeting of the university corporation, when Felix Frankfurter was made professor of law, his appointment to date from Sept. 1, 1914. Prof. Frankfurter graduated from the College of the City of New York in 1902 and from the Harvard Law School in 1906. Since then he has held a number of positions under the Federal Government.

Youngest Federal Judge Resigns.—William L. Day, Judge of the United States District Court at Cleveland, Ohio, has resigned from the bench, after a service of less than three years. The inadequacy of the salary connected with the office was alleged by Judge Day to be the reason of his resignation. Judge Day is the son of William R. Day, associate justice of the United States Supreme Court, and is said to have been the youngest federal judge in the country.

New Head of Johns Hopkins.—Dr. Frank J. Goodnow of Columbia University and political adviser to the Republic of China has been chosen president of Johns Hopkins University at Baltimore. Dr. Goodnow is Eaton professor of administrative law and municipal law at Columbia University and is on a three years' leave in China. The Chinese government and the Carnegie International Peace and Endowment, which selected him for the position in China, have reluctantly released him from his service there.

Appointed Counselor for State Department.—Robert Lansing, of Watertown, N. Y., one of the best-known lawyers of Northern New York, has been appointed counselor of the department of state of the United States to succeed John Bassett Moore, who recently resigned. Mr. Lansing is a specialist in international law, having been counsel for the United States in the Behring Sea claims, United States solicitor on the Alaskan boundary tribunal, and counsel in the north Atlantic coast fisheries case at The Hague. He is at present agent for the United States on the British-American pecuniary claims commission.

Massachusetts Judicial Appointments.—Governor Walsh of Massachusetts has made the following appointments to the bench: Joseph J. Corbett, former corporation counsel of Boston, to be associate justice of the Land Court to succeed the late Louis M. Clark; District Judge Raymond A. Hopkins of Provincetown, to be Judge of the Probate Court of Barnstable County; John P. Kirby to be justice of the Police Court of Chicopee to succeed the late Luther White; Joseph F. Carmody to be associate justice of the Chicopee Police Court to succeed John P. Kirby.

Retires from Federal Bench.—Judge George W. Gray of Delaware, one of the notable figures of the country's judiciary, has announced his retirement from the federal bench. Justice Gray is nearly 74 years old and has been a United States circuit judge for 15 years. The third federal judicial circuit to which Judge Gray is assigned, embraces the states of Pennsylvania, New Jersey and Delaware. During the period he served in the United States Senate, from 1884 to 1899, Judge Gray was put forward twice as a candidate for the Democratic nomination for the presidency. He has held many important positions, including the chairmanship of the anthracite coal commission appointed by President Roosevelt, and membership on the Paris commission that concluded peace with Spain in 1898, the permanent arbitration court at The Hague, the joint high commission which met at Quebec in 1898 and the North Atlantic coast fisheries arbitration at The Hague.

An English Appreciation of John Bassett Moore.—A recent issue of the London *Law Times* says: "Mr. John Bassett Moore, whose resignation of the office of counsellor to the state department at Washington has been announced, is one of the most distinguished of American jurists. For many years he filled the chair of international law and diplomacy in Columbia University, was one of the founders of the American Society of International Law, and one of the editors of the society's Journal. He has taken an active share in various conferences, and not so long ago was appointed a member of the Permanent Court of Arbitration at The Hague. It is by his writings, however, that Mr. Moore is best known on this side of the Atlantic, and his contributions to the special department of law that he has made peculiarly his own have been both numerous and valuable. Twenty-three years ago he brought out his treatise on Extradition, and more recently his monumental History of International Arbitrations, and even more elaborate Digest of International Law. The last-mentioned work is an immense storehouse of information on all that relates to public law. It may be added that Mr. Moore wrote the notes of American cases which appeared in the first edition of Professor Dicey's Conflict of Laws."

Canadian Bar Association.—Representatives of the bar from the different provinces of Canada, met at Ottawa, Ont., on March 31, and organized the Canadian Bar Association. The constitution is based upon that of the American Bar Association. The latter organization was represented by Charles Thaddeus Terry of New York and Walter George Smith of Philadelphia, who were deputed to attend the meeting by former President Taft. Officers were elected as follows: Honorary president, the Hon. C. J. Doherty, minister of justice; honorary vice-presidents, the attorneys-general of Canada; president, J. A. M. Aikens, K. C., M. P., of Winnipeg; vice-presidents, Nova Scotia, Humphrey Mellish, K. C., Halifax; New Brunswick, M. G. Teed, K. C., Fredericton; Prince Edward Island, K. J. Martin, K. C., Charlottetown; Quebec, R. C. Smith, K. C., Montreal; Ontario, James Bicknell, K. C., Toronto; Saskatchewan, James McKay, M. P., Prince Albert; Manitoba, the Hon. H. A. Robson, Winnipeg; Alberta, James Muir, K. C., Calgary; British Columbia, Gordon Corbould, K. C., New Westminster; secretary, E. Favre Surveyor, K. C., Montreal; associate secretary, R. W. McCraig, Winnipeg, and treasurer, J. F. Orde, K. C., Ottawa. The council is to be composed of eight members each from the bars of Ontario and Quebec and four from each of the other provinces.

Other Deaths.—In addition to the deaths heretofore mentioned in this column, the following recent losses to the profession may be noted: March 14, at Nevada, Mo., J. B. Johnson, aged 65, prosecuting attorney of Vernon County and formerly circuit judge of the Twenty-sixth Judicial District of Missouri; March 15, at Dorchester, Mass., Louis M. Clark, judge of the Massachusetts Land Court; March 15, at Mt. Vernon, Ohio, Charles E. Critchfield, aged 77, judge of probate for nine years; March 15, at Boston, Mass., James Brown Lord, formerly justice of the Boston Municipal Court; March 15, at Chicopee, Mass., Luther White, judge of the Chicopee Police Court; March 16, at Mt. Vernon, Ohio, John Byron Waight, aged 64, former Common Pleas Judge; March

17, at Chicago Ill., Mary E. Miller, leader of the Chicago female bar and president of the Human Rights Party; March 18, at Falmouth, Ky., John H. Barker, formerly county judge of Pendleton county; March 21, at Barnstable, Mass., Freeman H. Lothrop, judge of the Barnstable probate court; March 21, at New Haven, Conn., Henry G. Newton, federal referee in bankruptcy, and one of the most prominent members of the Connecticut bar; March 26, at Danielson, Conn., Oliver E. Getty, judge of the probate court of Killingly; March 29, at Burlington, Vt., Zophar H. Mansur, formerly lieutenant governor of Vermont; April 5, at Columbus, Neb., W. M. Cornelius, a prominent lawyer of Nebraska; April 5, at Spencer, Md., John C. Robinson, former circuit judge of Indiana; April 8, at Chicago, Ill., David B. Lyman, former president of the Chicago Bar Association.

English Notes.

The Cost of the Courts.—With regard to the arguments put forward by the so-called "economists" against any further expenditure on the judiciary, the figures given by Sir John Macdonell in the volume of statistics recently issued by him are instructive. The courts of justice cost each inhabitant of England and Wales in 1913, 2.154 pence per year, the net cost being £327,877. If criminal administration is deducted, that figure would be reduced to £100,000 to £120,000 per annum. The learned compiler of the statistics says: "The above figures are truly remarkable. It may be doubted whether the civil courts of any other country show similar results."

Biblical Interpretation.—The somewhat curious spectacle of a court of law deciding a point raised in a criminal trial by a judicial interpretation of the meaning of certain of the Levitical laws set out in the Old Testament was recently witnessed in Edinburgh. By a statute of 1567 (1 James VI, c. 18) a punishment for incest was introduced into the Scots criminal law. This statute affords an example of an unusual form of draftsmanship, inasmuch as it incorporates the eighteenth chapter of Leviticus. The High Court of Justiciary at Edinburgh was called upon to decide upon the relevancy of an indictment charging a man with incestuous intercourse with his brother's wife, and, in order to do this, had to construe certain verses contained in that chapter. Luckily, no such situation can arise under the Incest Act 1908, which for the first time made incest, as such, a crime punishable by the secular courts in England, for that statute enumerates the persons between whom intercourse is incestuous. It should be noted that the list of persons so enumerated is by no means so extensive as that contained either in the Tables of Affinity or the chapter of Leviticus referred to in the Scottish statute.

Theatrical Censorship in Ireland.—The prosecution of a person in the Dublin Police Court for disorderly conduct at a theater recalls the fact that there is practically no restriction in Ireland as to the productions that may be staged there. The censorship of the Lord Chamberlain does not apply on that side of St. George's Channel. Public opinion is in reality the only check on managers, and, judged by its results, it is in many respects preferable to the other system. In Dublin no theater can be established except by Royal Letters Patent, under 26 Geo. III, c. 57, an Irish Act, and entitled "an act for regulating the stage in the city and county of Dublin." This statute gave the Lord-Lieutenant power to interfere to prevent plays subversive of religion or morality, but only by withdrawing the patent after a notice published in the Dublin Gazette. But this act does not apply outside the city and county of Dublin. In Belfast, theaters are licensed by the mayor under a local act; in Cork, the only theater in the city is licensed by the corporation, and the same practice prevails in the other towns in which theaters exist. The Select Committee of the House of Commons which sat in 1892 on the subject of "theaters and places of entertainment," declared that it "had no reason to think that the public or the managers of theaters and places of entertainment in Ireland are dissatisfied with the present state of the general law on these subjects."

Treasure-trove.—A reply given by Mr. Montagu, as Secretary to the Treasury, to Mr. Stuart Wortley, who asked whether coins recently found during excavations in Sheffield would be granted to the Sheffield public museum, or whether rewards to the finders would be granted, is illustrative of the moderation in the exercise of the Royal prerogative in respect to treasure-trove, as compared with former times. "Some of the coins," said Mr. Montagu, "have been retained for the national museums in accordance with established practice. It would be contrary to the regulations disposing of treasure-trove to make a free grant of any of the coins, but an offer has been made to sell the remaining coins to the Sheffield City Council. The question of reward is still under consideration." The idea of a reward to a finder of treasure-trove would not be entertained in days gone by, since its concealment, which is now only punishable by fine and imprisonment, was formerly punishable by death. The finding, however, of deposited treasures was much more frequent in days gone by when government was unsettled and the treasures themselves more considerable than any likely to be discovered in more peaceful periods. Formerly, indeed, treasure-trove, whether hidden, lost, or abandoned, belonged to the finder. "But afterwards," according to Blackstone, "it was judged expedient for the purposes of state, and particularly for the coinage, to allow part of what was so found to the King, which part was assigned to be all hidden treasure as distinguished from such as is either casually lost or designedly abandoned by the former owner."

The Sale of Honors.—The debate in the House of Lords on February 23 with reference to the alleged sale of honors may render it of interest to recall recollection to the fact that the Duke of Buckingham in the reign of Charles I. was impeached on thirteen articles, and the ninth article was the sale of honors. He was impeached for the sale of a peerage to Lord Roberts for £10,000. The House of Commons, in support of the impeachment, stated the heinousness of perverting the ancient honorable way of obtaining titles of honor, and they urged the crime of taking away from the Crown the fair and frugal way of rewarding great and deserving subjects. In the Irish House of Commons, Mr. Grattan on February 20, 1790, in proposing a motion deprecating the sale of peerages, laid great stress on the fact that the practice corrupts the dispensation of justice as well as the fountains of the law. "The sale of a peerage is," he said, "the sale of a judicial employment of the highest judicial situation—a situation whose province it is to correct the errors of all other courts. Such a sale goes against the common law and against the spirit of every statute made on the subject. There is an act, the 6th of Edward VI., against the sale of judicial employments and employments that in anywise touch or concern the administration of justice. It is a practice reprobated in pointed terms by

Lord Coke, and, if authority were necessary to mark out its criminality, it stands condemned."

Soldiers and the Law.—The situation created by the resignation of certain officers of the regular army, and the discussion which has ensued thereupon in Parliament, are of great interest to those of the legal profession who are versed in constitutional law. Mr. Justice Stephen, whose authority upon such a point nobody would question, points out that the soldier is subject to two jurisdictions, the civil and the military, which may involve him in a difficult position when those jurisdictions conflict. On the one hand, if ordered to attack a civilian, and the soldier obeys, he may be amenable in his character as an ordinary citizen to the criminal jurisdiction of the civil courts, whilst, on the other hand, refusal to obey the order of his superior may put him within reach of the military jurisdiction of a court-martial. The great difficulty arises as to what cases or circumstances will, in the eye of the common law, justify a soldier in making an attack upon a civilian in obedience to the superior orders of his commander. Such a case does not appear to have received any authoritative decision in an English court of law, but the generally accepted opinion would seem to be that the order of a military superior will justify his subordinates in executing an order, for the giving of which they may fairly and reasonably suppose he had good ground. Each case must depend, of course, upon the whole circumstances surrounding it, the difficulty of laying down any more definite rule being much the same as that which besets anyone who endeavors to define the amount of violence or threatened violence necessary to justify an assault and battery. The difficulty may, of course, in many cases be obviated by a reliance upon the duty of a soldier, in his capacity of citizen, to come to the aid of the law in the suppression of a riot or armed resistance to the executive which is endeavoring to enforce a legal measure or to perform its legal duties.

Hats in the House.—The personal explanation of Sir George Scott Robertson in the House of Commons on February 28, in reference to strictures on his conduct on the preceding day in remaining "covered" when Captain Guest, M. P., in his capacity of Treasurer of the Household read at the bar of the House a message of thanks from the king for the loyal and dutiful address of the Commons in reply to the speech from the throne, may call attention to the principles of constitutional usage in reference to the removing of the hat in Parliament. Before the introduction of the wig, the speaker always wore his hat, but could not wear it without a breach of etiquette when addressing the house. Though members, like the president, sat covered, the custom argued no absence of ceremony or want of respect, or even an assertion of independence, for hats were in times past worn in private houses and even at dinner-time, and, by a fashion still more unbecoming, in church. Pepys complains in his diary of a "strange cold in my head by flinging off my hat at dinner." Colonel James Turner, the Jack Sheppard of Charles II.'s day, assured the people from the scaffold of his pious horror at any appearance of levity: "I never durst see a man in church with his hat on, it troubled me very much:" (State Trials, vii.; see also Townsend's History of the House of Commons, ii., pp. 441–442). There are, however, circumstances under which a member must be "uncovered." In both houses every member who speaks stands uncovered. The only occasion in both houses when a member speaks sitting and covered is a question of order which has arisen whilst the doors are closed. The chair is then addressed by a member who wears his hat and sits to distinguish him from the other members who are uncovered and running to and fro between the division lobbies. Messages from the crown under the sign manual, read by the Lord Chancellor in the Lords as the speaker of that house and in the House of Commons by the speaker, are read while all the members are uncovered; but this rule does not apply to an answer from the sovereign to an address from the house which is read at the bar, nor to the speech from the throne when read to the House of Commons from the chair. The reason in the first case seems to be that as the address originated in the house, the reply thereto may be well received by the house covered in assertion of its independence; and the reason in the second case seems to be that the reading of the king's speech by the speaker of the House of Commons after it has been delivered in the House of Lords to both Houses of Parliament is a proceeding not emanating from the throne, but for the convenience of the House of Commons itself, to enable that house to be better acquainted with the contents of the speech, of which the speaker informs the house that for greater accuracy he has obtained a copy. The rule with reference to the wearing of the hat or the uncovering during the reading of messages from the throne was enunciated by Mr. Speaker Brand, who made the following statement: "Any message direct from the Crown is always received by members of this house uncovered, and an entry to that effect is made in the votes. That observation does not apply to an answer from the sovereign to an address from this house." This statement was elicited by the observation of Mr. H. B. Samuel, who said (we quote from Hansard): "As recently as Friday, the 10th March, during the reading of the message from the Queen, I took particular notice that the right hon. gentleman, the late secretary of state for the Home Department, Sir R. Assheton (Viscount Cross), and the late secretary for the Colonies, Sir M. Hicks-Beach (Viscount St. Aldwyn,) both sat with their hats on. I wrote it down at the time because I knew there had been some controversy on the question."

Obiter Dicta.

An After Dinner Scrap.—Coffee *v.* Black, 82 Va. 567.

Tripping along the Path.—Lightfoot *v.* Lane, 104 Tex. 447.

Taking the Defendant's Measure.—Peck *v.* Pease, 5 McLean (U. S.) 486.

Woodman, Spare that Tree!—Ash *v.* Century Lumber Co., 153 Iowa 523.

A Hot Irish Stew.—In the case reported in 84 Ill. App. 292, Le Fever, Side and Bacon were plaintiffs, and Murphy was the defendant.

Three Classes.—In Westbrooks *v.* Jeffers, 33 Tex. 90, the court remarks: "Gentlemen, Christians, and Masons do not make misrepresentations and state falsehoods to enable them covertly to obtain advantage over the property of married women." Analytically speaking, then, gentlemen are neither Christians nor Masons, Christians are neither gentlemen nor Masons, and Masons are neither gentlemen nor Christians.

Digging with the Brassie?—There is humor in the Law Courts which is sometimes not reported, says the London (Eng.) *Daily Citizen*. One day last week the Solicitor-General, Sir

Stanley Buckmaster, was appearing in a case before Mr. Justice Scrutton, and judge and counsel were debating some point of law with regard to land. "We must not forget," said the judge, "that golf is not an agricultural pursuit." "Mine is," replied the Solicitor-General gravely.

A CASE OF FIRST IMPRESSION.—Trammell *v.* Vaughan, 158 Mo. 214, was an action for breach of promise of marriage. The plaintiff, in the second count of her petition, made the remarkable allegation that the defendant entered into the contract of marriage wilfully and maliciously, not for the purpose of marrying her, but to humiliate and disgrace her. Said Judge Marshall: "This is, as far as we are advised, the first case on record, for maliciously maintaining a suit in the courts of Cupid." Which shows that Judge Lamm is not the first humorist to adorn the Missouri bench.

WHAT CONSTITUTES "NOTICE."—Gray *v.* Wulff, 68 Ind. App. 376, was an action by Wulff to recover his salary as leader of an orchestra in Gray's opera house. Wulff claimed, among other things, that he had not been given the usual and customary notice of discharge. With respect to this point the court said: "We think that his own testimony showed sufficient notice. It was to the effect that after he was told, as he was, that a company carrying its own orchestra would occupy the house, and that he would not be needed, he applied to Wiley, the manager, and was told by him, in reply as to whether he could go to Chicago for a few days, that yes, he could go to hell."

THE ART OF INDEXING.—Robert P. Reeder's book on "The Validity of Rate Regulations," seems to be remarkably well indexed. On page 439 of the Index, the following title and reference may be found:

TOP-KNOTS.
Swift on, 128, note.

Curiosity impelling us to investigate, we find on page 244, in a note at the bottom of the page, these interesting observations: "The connection in which a term is used is important. It is said that Dean Swift once based a sermon against the style of hairdressing in favor with the women of his day upon that part of Matt. xxiv. 17 ('Let him which is on the house-top not come down to take anything out of his house') which reads 'top-knot come down.'" Of course, the connection between top-knots and rate regulations is not easily discernible, but what matters that if the opportunity to tell a good story presents itself?

MISPLACED SARCASM!—"On February 5, 1891, David Moran, seventy years old, with two adopted children, but no lineal heirs, was united in marriage with the plaintiff, then a lady of thirty summers. They resided in Andrew county, where the husband was possessed of two farms, one of 500 acres, and the other a smaller tract of 106 acres. On the smaller farm, these victims of the designing Cupid made their home until thirteen months later, when the Grim Reaper, unmindful of the achievements of the aforesaid Cupid, and with a shameless disregard for connubial felicity, entered the Moran home, and wantonly struck down the doting husband." Per Brown, J., in Moran *v.* Stewart, 246 Mo. 466. At the risk of finding ourselves in contempt of court, we beg to chide gently the learned judge for his unseemly sarcasm, reminding him of Shakespeare's couplet:

> "Love looks not with the eyes, but with the mind;
> And therefore is winged Cupid painted blind."

JUDGE LAMM ON THE HEREAFTER.—Not to slight Judge Lamm in this issue, we note the following obiter dicta in Strother *v.* Barrow, 246 Mo. 255: "Learned counsel, taking us into their confidence, assure us that the Universalist faith 'is a beautiful faith.' If necessary, we would be willing to rule that it was a comfortable faith, and, if we were permitted to express a judicial hope, it would be the hope that it may turn out to be a true one in the great Day of Final Accounts; for does not a very good book say we are all miserable sinners? We pause to ask: May a mere earthly court (the which we admit we are) go out of its way to repudiate the sunny theological dogma, much doubted by some stout polemics, viz., that every man will be finally saved and dwell forever with the felicitous? No! Emphatically, no! Angels and Ministers of Grace defend us! So the melancholy Dane exclaimed (when startled by a well-known apparition) and so say we. We say it in the form of a pious exclamation, because sometimes an exclamation is as good as a discourse, and let it go at that. Why should we decide the point when we have no jurisdiction of the subject-matter?"

CONCERNING BARBERS.—"It hath never happened from the earliest times to the present, that barbers, who are an ancient order of small craftsmen serving their customers for a small fee, and entertaining them the while with the small gossip of the town or village, have been held responsible for a mistake made by one customer whereby he taketh the hat of another from the common rack or hanging place appointed for all customers to hang their hats, this rack or place being in the same room in which customers sit to be shaved. The reason is, that there is no complete bailment of the hat; the barber hath no exclusive custody thereof, and the fee for shaving is too small to compensate him for keeping a servant to watch it. He himself could not watch it and at the same time shave the owner. Moreover, the value of an ordinary gentleman's hat is so much in proportion to the fee for shaving, that to make the barber an insurer against such mistakes of his customers would be unreasonable. The loss of one hat would absorb his earnings for a whole day, perhaps for many days. The barber is a craftsman laboring for wages, not a capitalist conducting a business of trade or trust." Per Bleckley, C. J., dissenting, in Dilberto *v.* Harris, 95 Ga. 571.

THE BIRD THAT WOULDN'T SING.—In De Rivafinoli *v.* Corsetti, 4 Paige Ch. (N. Y.) 264, an action to compel the defendant (note his dressy name!) to comply with a contract to sing for the plaintiff, the grave and learned Chancellor Walworth unbent long enough to rid himself of the following thoughts: "Upon the merits of the case, I suppose it must be conceded that the complainant is entitled to a specific performance of this contract; as the law appears to have been long since settled that a bird that can sing and will not sing must be made to sing. (Old adage.) In this case it is charged in the bill, not only that the defendant can sing, but also he has expressly agreed to sing, and to accompany that singing with such appropriate gestures as may be necessary and proper to give an interest to his performance. And from the facts disclosed, I think it is very evident also that he does not intend to gratify the citizens of New York, who may resort to the Italian opera, either by his singing, or by his gesticulations. Although the authority before cited shows the law to be in favor of the complainant, so far at least as to entitle him to a decree for the singing, I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve which is necessary to understand, and to enjoy with a proper zest, the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty, there-

fore, even if the defendant was compelled to sing under the direction and in the presence of a master in chancery, in ascertaining whether he performed his engagement according to its spirit and intent. It would also be very difficult for the master to determine what effect coercion might produce upon the defendant's singing, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama. But one thing at least is certain; his songs will be neither comic, nor even semi-serious, while he remains confined in that dismal cage, the debtor's prison of New York. I will therefore proceed to inquire whether the complainant had any legal right thus to change the character of his native warblings, by such a confinement, before the appointed season for the dramatic singing had arrived."

A MISSISSIPPI TRAGEDY.—Real oratory is rare. Therefore we are moved to reprint the following true story of a tragedy, in the telling of which Judge McLean of the Mississippi Supreme Court uses the English language with abandon but with real oratorical effect: "The record in this case is a striking illustration that 'truth is stranger than fiction,' and 'how unsearchable are the judgments of God, and His ways are past finding out.' The appellant, during a drunken debauch, being tanked up on 'blind tiger' liquor, and meeting an old negro man, pulled out his pistol and said to him, 'Old nigger, you don't think I'll shoot,' and the negro replied, 'Yes, white man; I know you will, if you say so;' and appellant, repeating this once or twice, pointed the pistol toward the ground, somewhat to the side of the negro, and pulled the trigger. The pistol fired, the ball probably striking a tin can, or some other hard substance, ricochetted, and just at that moment a young lady stepping out upon the gallery of a nearby house, was struck in the forehead by this glancing ball, and instantly killed. The appellant was unpopular, with scarcely any friends, and without influence, brought about, no doubt, by the demoralizing use of liquor. The appellant went home without knowing that he had injured anyone, and when the officer arrested him, which was a very short time thereafter, the appellant was found in a drunken stupor. The father of this young lady was influential and popular, a gentleman of culture, and a prominent office holder of his county. It is gleaned from the record that his daughter, who met her sad and untimely death by this stray bullet, was beautiful, accomplished, and refined, a favorite in her community, and, standing upon the very threshold of her young womanhood, with all the freshness and fragrance of youth around her, there were many rainbows in her sky and fancy colored every object with its gorgeous tint. The news of this tragedy quickly spread. The newspapers of the county appeared with sensational headlines and inflammatory editorials, not only condemning the crime, but called down the most direful punishment upon the head of this rowdy, drunken defendant. The inevitable result followed. The community, and we may add justly so, was stirred with indignation to its profoundest depths. Threats of lynching and mob violence were heard to such an extent that the deputy sheriff, being apprehensive that his prisoner would be taken from jail and mobbed, thought it advisable to carry the appellant, for safe-keeping, to an adjoining county. Within two or three months thereafter the grand jury assembled, and very promptly returned an indictment, charging appellant with murder. A motion for a change of venue was made by defendant, upon the ground that, owing to the state and condition of the public mind and the undue prejudice existing against him, he could not secure in that county a fair and impartial trial. This motion was overruled, and the defendant forced to trial for his life. The court went through the solemn form of trying this man for murder, when there was not one element of murder in the case. He was convicted of manslaughter, and sentenced to the penitentiary for ten years. This is a tragedy, and this the scene. Without going into a discussion of the evidence produced on the motion for a new trial, it is sufficient to say that, under the circumstances, it was practically impossible for this defendant to have obtained what the law regards as a fair and impartial trial, and the motion for a change of venue should have been sustained. . . . Every one, regardless of station or circumstances, regardless of the crime charged, is entitled to a fair and impartial trial. The Constitution so declares. Every principle of justice and right so proclaims. The law is blind. It does not and cannot see any distinction between the influential and the lowly, between the popular and the unpopular, between wealth and poverty, between strength and weakness, between the master and the servant, between the white and the black, but, like the sunshine from heaven, sheds its radiance upon all alike, and beneath its protecting aegis all can gather when the storms of passion, prejudice, and indignation arise, causing reason to desert its post and mania to seize the helm; in fact, to try one at such a time and place and by such a jury destroys the very palladium of the rights and privileges of the American citizen."

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Mediation in Mexico.

AT the present writing the kindly offices of mediation in the Mexican imbroglio have been offered by the "A B C" republics of South America. The proffered mediation has been tentatively accepted, and there is a fair prospect that the issues between the United States and Mexico will be settled and composed without resort to the bloody arbitrament of arms. Let us hope that they may. As lawyers we are interested in peace. War is bad for the law business, especially at or near the scene of hostilities. *Silent leges inter arma.* Lawyers are sufficiently patriotic, however, not to wish for peace with dishonor or with the continuance of the condition of anarchy across the border that jeopardizes the lives and property of American citizens. It is to be hoped that if mediation is definitely entered upon, the mediators will not confine their deliberations to punctilios connected with the Tampico incident. The best fruits of mediation will be in conventions that shall make for the rehabilitation of Mexico—the establishment of a stable government there that shall not only be a pledge for the security of American lives and American investments, but that shall likewise promote the happiness and lasting welfare of the Mexicans themselves.

Reclaiming the Toper.

A UNIQUE sentence was recently imposed at Grand Rapids, Mich., upon a confirmed tippler who appeared before the police court for the third time. The judge imposed sentence in these terms: "I sentence you to appear in my office every morning for two weeks. You will read the book 'Drunkenness: What It Is and How to Cure It.' I'll mark your lessons and you'll recite to me after each study period. I'll cure you of your habit." It is reported that after the first "lesson," the toper grew interested, and now he declares he is done with drinking. It is easy, of course, to see the humor of this incident and to dismiss it with a mere pleasantry. We trust that no reflection will be cast upon our own sense of humor if we give expression to the serious thought that the incident suggests. We are inclined to believe that the efficacy of the sentence in reclaiming the Grand Rapids toper lay not so much in the character of the sentence itself, as in the personal interest shown by the court in the prisoner in the dock. An episode in the life of John B. Gough, the noted temperance advocate, may not be here impertinent. A short time after Mr. Gough, who had been a hard drinker, had signed the pledge of total abstinence, he was seized while at work in his shop with an uncontrollable thirst for liquor. As he was preparing to leave the shop for the purpose of satisfying his craving a man of some prominence in the community came into the shop and shook Mr. Gough's hand warmly, saying that he was glad to hear that he had signed the pledge and that he hoped he would be able to keep it. When the man left the shop Mr. Gough went back to his work saying to himself determinedly, "If he's glad, then he shall be glad." The pledge was kept. And what that meant to Gough himself and to the wide public that he afterwards reached by his eloquent appeals, is a matter of history. *Hæc fabula docet*—well, we shall not press the moral of the story, as we think it is sufficiently obvious. We may say, however, that if our police magistrates, instead of hastily clearing their dockets with the futile fine or workhouse sentence, would be studious to apply helpful and curative methods wherever possible—if, in short, they approached the unfortunates who are brought before them more from the human and less from the legal standpoint, many a derelict would doubtless be reclaimed, and the ends of justice would be quite as fully subserved.

Criminals as Subjects for Laboratory Experimentation.

LAWYER John S. Durand, in a paper read recently before the American Association of Medical Jurisprudence, proposed as a substitute for the death penalty that criminals who have been convicted of capital crimes expiate them by being subjected to experimentation; that is to say, that the various experiments which are now being performed on animals in institutions of research be made upon criminals who have forfeited their lives or liberty to the state. "How much more scientific it would be," said Mr. Durand, "instead of blotting out a life that is forfeit to the state, to utilize that life in the interest of science and for the purpose of assisting man in his fight against disease and for the relief of human suffering. Startling, you will say, perhaps cruel. Yes, but is it not cruel to put a man on the gallows or in the electric chair and take his life to no purpose other than to deter others from the commission of the crime of which he has been convicted? In states where there is not capital punishment is it not cruel to deprive a man of his liberty as long as he shall live? When we speak of punishment we make differentiations between cruelty which is wanton and the infliction of suffering for a justifiable end. Under the scheme suggested, there need not be nor should anything be allowed to be done calculated to inflict any real suffering. To compel a man to lie in practically the same position for several years need not cause any suffering. Drugs and

serums which have been perfected as far as possible in experiments on animals so that they are believed to be harmless can be tried on human beings without serious pain or inconvenience. In fact there is a limitless field for scientific investigation, without cruelty to the individual or suffering on his part, which would result in the greatest benefit to mankind; and to incarcerate a man for life for the purpose of scientific investigation probably would be as great a punishment for the individual himself as the death penalty. Of course the investigations would have to be in the hands of men of the highest standing. Vivisection certainly would not be permitted, but the commission should after careful investigation decide the proper limits within which tests should be permitted, always bearing in mind that nothing calculated to inflict pain should be allowed."

The question naturally arises as to whether such a scheme as Mr. Durand proposes would infringe the constitutional provisions which forbid the infliction of cruel and unusual punishments. This point is not overlooked by Mr. Durand, and appears to be fairly met in the various restrictions and safeguards with which he has hedged about his interesting and suggestive proposal. The scheme is, of course, too radical a departure in penology to be either approved or condemned out of hand. As a substitute treatment for first-degree criminals it has much to commend it. We certainly appear to be making very poor use of these criminals when we kill them or immure them to rot behind prison walls.

Some Legal Aspects of War.

ONE of the serious questions raised by the present complications with Mexico is as to the effect upon litigation between citizens of the two countries now pending in American and Mexican courts. If the present trouble should develop into declared war it would seem as if all such litigation would have to be suspended. "Public war," said Mr. Justice Clifford in *The William Bagaley,* 72 U. S. (5 Wall.) 377, "duly declared or recognized as such by the war-making power, imports a prohibition by the sovereign to the subjects or citizens of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country." In *Matthews* v. *McStea,* 91 U. S. 7, Mr. Justice Strong, in delivering the opinion of the court, said: "It must also be conceded, as a general rule, to be one of the immediate consequences of a declaration of war, and the effect of a state of war even when not declared, that all commercial intercourse and dealing between the subjects or adherents of the contending powers is unlawful, and is interdicted. The reasons for this rule are obvious. They are, that, in a state of war, all the members of each belligerent are respectively enemies of all the members of the other belligerent; and, were commercial intercourse allowed, it would tend to strengthen the enemy, and afford facilities for conveying intelligence, and even for traitorous correspondence. Hence it has become an established doctrine, that war puts an end to all commercial dealing between the citizens or subjects of the nations or powers at war and 'places every individual of the respective governments, as well as the governments themselves, in a state of hostility;' and it dissolves commercial partnerships existing between the subjects or citizens of the two contending parties prior to the war; for their continued existence would involve community of interest and mutual dealing between enemies." It is in consonance with the rule thus declared that treaties have been held to be broken or annulled by a war arising between the contracting parties. *Hutchinson* v. *Brock,* 11 Mass. 119. Similarly a state of war has been held to suspend all contracts in existence between the citizens of the respective belligerents at the time the war commences. *Semmes* v. *City Fire Ins. Co.,* Fed. Cas. 12,651, (6 Blatchf. 445) *affirmed* 80 U. S. (13 Wall.) 158, 20 L. Ed. 490; *Isaacs* v. *McGrath,* (S. C.) 1 Nott & McC. 563. And, more pertinently to the question under consideration, it appears to be well settled law that during the existence of war an enemy cannot sue in any of the courts of the hostile belligerent power. *Crawford* v. *The William Penn,* Fed. Cas. (U. S.) 3,372, 1 Pet. C. C. 106; *Perkins* v. *Rogers,* 35 Ind. 124, 9 Am. Rep. 639; *Hutchinson* v. *Brock,* 11 Mass. 119; *Levine* v. *Taylor,* 12 Mass. 8. It seems, however, that war only suspends civil rights and remedies as between citizens of the antagonist powers; it does not destroy them; and when the war ceases the parties are remitted to their remedies against each other as if no suspension had occurred. See *Louisville, etc., R. Co.* v. *Buckner,* 71 Ky. (8 Bush.) 277, 8 Am. Rep. 462, wherein it is held that a citizen or corporation in one country or one section of a country at war with another cannot avoid responsibility for the unauthorized appropriation of an enemy's private property, whether the possession be acquired by a mere trespass or through the form of a purchase under an illegal judgment of a court.

The Law of Osculation.

WE are indebted to the *London Daily Telegraph* for information cabled to that paper by its Berlin correspondent concerning an important decision recently rendered by the Imperial Court at Leipzig. It appears that when the German Criminal Code was compiled the law-makers, by some oversight, omitted to lay down the boundary line between permissible and illicit kisses. This deficiency has now been made good by the decision of the Leipzig court. The ruling of that august tribunal is as follows: "A kiss is an operation on the body of another which always requires the permission of the person kissed. Kisses may only be given without special permission when the tacit consent of the other is certain—that is to say, in the cases of close relatives, parents, children, and lovers. If, on the other hand, the other not merely affects coyness, but offers serious resistance, it is to be assumed that the kiss is regarded as an illegal interference with personal rights and an impairment of honor. Whoever, under such circumstances, imposes a kiss on another renders himself, therefore, guilty of an insult by the act. For the fulfilment of these conditions it suffices that the kiss is given against the will of the other. It is not necessary that he himself feels the kiss to be insulting."

So much for German law upon the subject. Our own courts have not been wholly silent upon this important question. For example, in *Chambless* v. *State,* 46 Tex. Cr. 1, 79 S. W. 577, wherein the prosecutrix stated that the appellant asked her to kiss him, and on her refusal he reached his hands out as if to grab her, and she jumped out of the door, this, the court held, might constitute an assault, under the authorities. "That is," says the court,

"appellant evidently had the ability of committing a battery on prosecutrix, and if, without her consent, he attempted, by the use of force, to make her kiss him, and she fled to prevent this, then there would be an assault. If on the other hand appellant reasonably believed, under the circumstances, that prosecutrix would allow him to kiss her, and that he merely attempted to kiss her by consent, and did not intend to use force to compel her to kiss him, then it would not be an assault." In *Fuller* v. *State,* 44 Tex. Cr. 463, 73 S. W. 184, 100 Am. St. 871, it was learnedly held that if a man makes a kissing sign at a woman by puckering up his lips and smacking them, without showing any intent to lay hands on her and kiss her without her consent, he is not guilty of an assault. "An assault," said the court, "is defined to be 'any attempt to commit a battery, or any threatening gesture showing in itself, or by words accompanying it, an immediate intention, coupled with the ability, to commit a battery.' If appellant by his acts had manifested any intention at the time to lay hands on prosecutrix and to kiss her without her consent, his acts and conduct would unquestionably have made an assault; but we fail to gather from the statement of what occurred, as contained in the record, that he did anything at the time showing that he intended to take a kiss without the consent of the prosecutrix. What he did could not be construed into any more than asking prosecutrix to give him a kiss, and even if he had done this, without manifesting some ulterior purpose to use violence to force her to comply with his request, it would not amount to an assault, for there would be lacking the essential element, 'showing by his acts and conduct an immediate intention to commit a battery.' It may have been, and doubtless was, improper for him to make the 'kissing sign' to prosecutrix, as she terms it, or suggest that he would like to kiss her; but this, under the circumstances, did not render him guilty of an assault."

One naturally wonders how a lawsuit could grow out of the facts disclosed in the case last quoted from. A fact not yet stated, however, may throw some light on the matter. It appears that after the defendant had repeated his osculatory demonstrations the prosecutrix said to him, "If that is the best you can do, you had better go home." Here lies a plausible explanation for the defendant's being haled into court. May not the prosecutrix have been actuated by pique and resentment over the extraordinary ineptitude of the defendant in the premises?

Tort Action by Wife against Husband.

IN a decision recently handed down by the Connecticut Supreme Court of Errors (*Brown* v. *Brown,* 89 Atl. 889) the court upholds the right of a wife to maintain a suit for damages against her husband for personal injuries inflicted by him. The court holds that the legislative intent in the Connecticut Married Women's Act (Pub. Acts 1877, c. 114) was to change the foundation of the legal status of husband and wife, and that the statute effects that change. "In marriages which have occurred since the act took effect," says the court, "the parties retain their legal identity, and their civil rights are to be determined in accordance with the status thus established. These rights, except so far as they are modified by the statute itself or by other statutes, or are necessarily affected by the reciprocal rights and obligations which are inherent in the relation of husband and wife, are the same as they were before marriage. The statute leaves nothing to implication. The right to contract with the husband and to sue him for breach of contract and to sue for torts is not given to the wife by the statute. These are rights which belonged to her before marriage; and, because of the new marriage status created by the statute, are not lost by the fact of marriage as they were under the common-law status. The status of the parties after marriage being fixed, there was no occasion for providing in express terms what the consequences would be. They follow logically." As a necessary consequence, therefore, of the wife's retention of her legal identity after coverture, by force of the statute, she not only has the right to contract with her husband and to sue him for breach of the contract, but she also has a right of action against him for a tort committed by him against her and resulting in her injury. In such a tort action the court sees nothing that is against public policy. The court says: "In the fact that the wife has a cause of action against her husband for wrongful injuries to her person or property committed by him, we see nothing which is injurious to the public or against the public good or against good morals. This is the usual test for determining whether a statute or a contract is against public policy. When a wife is allowed to possess and deal with her own property and carry on business in her own name like a *feme sole,* she ought to have the same right to contract and enforce her contracts, and the same remedies for injuries to her person and property, which others have, and to be liable upon her contracts and for her torts the same as others are. This is the position in which she now stands. The danger that the domestic tranquillity may be disturbed if husband and wife have rights of action against each other for torts, and that the courts will be filled with actions brought by them against each other for assault, slander, and libel, as suggested in some of the cases cited in behalf of the defendant, we think is not serious. So long as there remains to the parties domestic tranquillity, while a remnant is left of that affection and respect without which there cannot have been a true marriage, such actions will be impossible. When the purposes of the marriage relation have wholly failed by reason of the misconduct of one or both of the parties, there is no reason why the husband or wife should not have the same remedies for injuries inflicted by the other spouse which the courts would give them against other persons."

At common law, of course, one spouse could not sue the other, nor did any cause of action arise in favor of either by reason of any injury to the person or character committed by the other. *Henniger* v. *Lomas,* 145 Ind. 287, 44 N.E. 462, 32 L.R.A. 848. See also *Phillips* v. *Barnet,* 1 Q.B.D. 436, wherein it was held that a wife after being divorced from her husband could not sue him for an assault committed upon her during coverture. Even in jurisdictions where the legal duality of husband and wife has been established by legislation, the courts have not gone to the lengths of the Connecticut court in giving a married woman a right of action against her husband for a tort. Thus in England, notwithstanding the emancipating legislation of the Married Women's Property Act, it has been held that a wife is not entitled to sue her husband for false imprisonment or ma-

licious prosecution. *Tinkley* v. *Tinkley,* (1909) 25 T. L. R. (Eng.) 264. Nor can either spouse maintain a suit against the other for slander. *Young* v. *Young,* (1903) 5 F. (Ct. of Sess.) (Eng.) 330. In New York it has been held that notwithstanding the provisions of the Domestic Relations Act (Laws 1896, c. 272, § 27) giving a wife "a right of action for an injury to her person," she cannot maintain an action against her husband to recover damages for an assault and battery which he has committed upon her. *Abbe* v. *Abbe,* 22 App. Div. 483, 48 N.Y.S. 25, wherein the court said: "While the wife is given the full enjoyment of her separate estate and of her earnings, is permitted to carry on a separate business, may contract with her husband and sue him for debt or for a conversion of her property, yet, for the purpose of being a subject for an assault and battery by the husband, she is both wife and husband, and, therefore, without civil remedy."

The Connecticut decision is destined to attract wide attention and to create considerable discussion. The discussion, however, is likely to be largely academic and extrajudicial. Anything more inconsistent with the marriage relation than a tort action between the parties can hardly be imagined. Divorce with alimony will doubtless in the future as in the past afford the more satisfactory redress to wives in cases of assault from brutal husbands.

Picketing in Labor Disputes.

A LAW has been enacted in New Jersey which prohibits the courts from granting injunctions in labor disputes to restrain picketing. In order to obtain an injunction the employer must present a sworn application that it is necessary to prevent irreparable injury to his property rights, and the law provides that the right to do business in any particular place or of any particular kind shall not be classed as a property right. This law will make it practically impossible to obtain restraining orders in strike cases in New Jersey. It might be conducive to industrial peace if such legislation were enacted in all the states. There is seldom a strike in which the interposition of the courts is not sought to restrain the picketing of the strikers. And since the courts have established no well-defined line of distinction between legal and illegal picketing, the issuance of the restraining writs has rested largely in the discretion of the courts to which application therefor has been made. Writs directed against picketing have thus been frequently issued which, from the striker's viewpoint, have unjustly encroached upon personal liberty and which therefore, unfortunately, he has felt no moral obligation to respect. Contempts of the writs have been followed by punishments which have inflamed the passions of labor and, not unnaturally, engendered among a body of our citizenship an unfriendly feeling towards the courts. It is beside the mark to say that this feeling is not justified. It were well that it be removed. And a curtailment of the prerogative of the courts in the matter of the issuance of injunctions in industrial controversies should be no inconsiderable aid to that end.

Technicalities.

SECTION 4570 of the Revised Statutes of Missouri, 1909, makes it a crime to "sell, convey or dispose of" or to "remove or conceal" mortgaged chattels. In *State* v. *Miller,* 164 S.W. (Mo.), 482, the defendant was charged by information with removing and concealing mortgaged chattels. He was tried, and the jury returned a verdict finding him guilty of "disposing of chattels mortgaged, as charged in the information." The Missouri Supreme Court, on appeal by the defendant, reversed the case. In the opinion Judge Faris, who wrote it, pays his respects to the popular demand for the disregard of so-called technicalities in legal procedure as follows: "It would have been no greater legal solecism to have charged defendant with larceny and to have convicted him of rape. So, while we note with sympathy the uplift toward absolute simplicity of procedure and the trend toward panicky abjuration of all form, formality, and technicality, which ought soon to bring us again to that primitive justice whose machinery and needs are but the dark of the moon, a convenient oak tree, and a stout hemp rope, we are yet mindful of our sworn duty to follow the law and to observe the constitution—at least until such time as the legislature shall repeal all law, and the people shall abolish the constitution; and, being so curbed and hampered, we are constrained to hold that this conviction cannot stand."

ONE JUDGE DECISIONS.

IN a previous issue of LAW NOTES we had something to say upon the subject of "one judge decisions," and called attention to a recent reform instituted in the Supreme Court of Alabama, by which a system has been established whereunder every case will be considered and decided by the court before it is referred to a justice for the preparation of an opinion. It appears that prior to the inauguration of this system it was the practice to assign a submitted case to a single judge to prepare an opinion, which after preparation was brought into the consultation room for consideration by the other members of the court, the ultimate decision in the case depending apparently only on the soundness of the view expressed in that opinion. Of paramount influence in bringing about the change in the procedure of the court was a memorial to the court by a committee of the Alabama State Bar Association insisting that each case submitted upon appeal be decided before an opinion therein is written. A copy of this memorial is before us.

In view of the fact that "one judge decisions" after the manner of the former Alabama procedure prevail in a considerable number of the states of the Union, we feel warranted in giving space to the following liberal excerpts from the forceful and convincing paper presented by the Bar Association committee. "By the new rules," says the memorial, "you have required the appellant to state the facts of his case, which are to be accepted as stated, unless the appellee shows them inaccurate by reference to the transcript. You have required a statement of the points and authorities in succinct and unargumentative form, and have required that a sufficient number of these condensations be supplied for each justice to have a separate copy before him. The lawyers are thus to agree upon the facts, or to narrow their differences to the smallest compass. With the facts thus presented and

the divergent theories of law concisely arrayed one against the other, will the task of a preliminary discussion involve greater labor or a larger consumption of time than is required by the system of advance opinions which now prevails? Is the task of analysis and differentiation in a give-and-take of general discussion more laborious than the existing method of having half-blindly to weigh and criticise a legal essay written by the one member of the court who has formulated conclusions from a vantage point denied his auditors? The labor involved in discussing and deciding the case in council and there working out the general scope and purposes of the opinion, and then delegating to one justice the task of voicing the court's announced judgment, will, we apprehend, be no greater than that required under the existing rules of the court. But, if there be added labor, if more time be required, there is recompense in that the whole of the independent character and judgment of each justice is brought to the decision of each case, and nothing is warmed over, or warped by the individual idiosyncrasies of mind and temperament from which not even judges are immune. The results to be attained are worth all the labor and all of the time that a thorough preliminary consideration may require. Among these results are:

"A return to the confidence-inspiring position courts long maintained by making their decision the composite product of the good and learned men whom the people chose as their chief magistrates.

"It is grounded in human nature to distrust one man's judgment in dealing with the affairs of another man; hence throughout all our civilization, appellate courts have been composed of three or more, and juries of twelve men. The kings of old had their wise men, and the modern ruler summons the cabinet or ministers for council, not merely the head of the department to which the matter in hand belongs. The existence of reviewing courts is justified only by that power which comes from a concert of mentalities working each to complement the other—each to aid the other to overcome individual weakness, selfish bias and personal peculiarities. Where one is experienced another is untutored. Where one is analytical another is synthetic. Where one gives perspective another works out details. The extremes of one are disarmed by the contrary extremes of the other. There is magic in the cordial and natural touch of mind and mind. There is God-given power in eye to eye and voice to voice. If it be urged that these are platitudes and nothing worth because they all result from what follows after the reading of the product of the judge who has written the case, we say: What follows is not conference, but criticism. One is born in a spirit of mutual respect and kindliness; the other has, by the unalterable conditions of man's make-up, an element of the unkind. 'Let us reason together' is far different from 'let us criticise each other.' No man can produce a writing without having for it a feeling akin to fatherhood. No gentleman finds pleasure in the criticism of another's offspring. Every man worth while has in him a quality different from that of every other man. This, for want of a better name, we call individualism. And this, his own distinctive quality, every man loves. So are we made. This individualism is cloistered with a record, and with it cogitates and reads and writes and wrestles, without note of the mental processes, doubts and queries which would be suggested by associates did they share the task. The product is his and his alone. The judge is lost in the advocate, and as an advocate he enters the consultation room with an equipment of information and special research which gives him an undue and dangerous advantage over any brother disinclined to accept a prepared confession of faith in the forming of which he had no part. The participants in this aftermath to special individual labor do not reason together. One has reasoned for all.

"Discussion and decision before the case is written will avoid the delegation of a responsibility which should never be delegated.

"Of all functions with which mankind is invested, the judicial function is the most utterly destitute of any delegable element. No formal or informal system of referees or commissioners is recognized by either the spirit or the letter of our constitution. One judge has no more right to ask another judge to decide, even tentatively, for him, than he has to substitute an outsider. How vital this particular branch of the subject is, this court may best appreciate by considering the proportion of tentative opinions which become 'endorsed without recourse.' When the court makes one member the keeper of its conscience, no matter how guardedly or provisionally, it thereby commits itself tacitly, in advance, to accord to the result a *prima facie* presumption of correctness which makes dissent difficult and suggests acquiescence. The value of a preliminary discussion, in which each contributes of his special gifts, and special accomplishments and experience, right at the threshold and before the writing of any opinion producing well-nigh ineradicable preposession, cannot be overestimated. Such discussion would tend to a rational and a satisfying and a reassuring decision; and the opinion would not be strained, hesitant, protesting, attempting to convince the unconvinced. It would speak as 'one having authority, not as a scribe.' It would promulgate a union of judgment and precision. Opinions so rendered are definite declarations commanding acceptance as settled and stable. They do not encourage variant judicial utterances, because they neither parade nor antagonize individualism. The judge who in later months or years comes to these declarations finds fewer discordant elements and is less spurred to array his originality against another's initiative. . . .

"The course which it has become our duty to suggest to your honors would increase the capacity of each judge for public service and enhance the influence of the court as a whole. The chain is no stronger than its weakest link, because each link does its work alone. For the same reason a court working under the advance assignment method is measured by its weakest judge. A court which does the team work of advance consideration supplements the weak with the strength of the strong, and its measure of usefulness may well be that of its strongest judge. The newly elected sooner become worthy components of a worthy whole. The training of the judge of long experience becomes of greater value to the state. Decisions in which all participate on an equal footing will lighten the burden of responsibility upon each justice while the responsibility for each decision is increased. No justice need ever feel more responsible than his brethren for any output of the court.

"The adoption of the rule set forth in the resolution

of the Bar Association would, we believe, give added zest to the work of the court and permeate its output with new heartiness and vigor; for interest and enthusiasm is the mainspring of all effective labor. There is something deadening in this advance assignment of records. The disposition of one justice to consider the cases which are assigned to him as his special proteges leads to something like comparative indifference to the proteges of the other justices. The outcome of it all is that the average case gets the thorough consideration of only one man. No case has the attention of the attendants provided for it by law. If the boys are the special pets of the father, and the girls the special favorites of the mother, no child enjoys the intense solicitude of the two parents which is its right, and the whole brood are semi-orphans. When a justice knows that he is not to write in a given case, the tendency is towards a rather perfunctory reading of prosaic briefs. His discussion of the opinion when brought before him is liable to be likewise perfunctory, and in such discussion his impression of the points rather obscure. The confidence which the non-writing judge may feel in the writer makes him the readier to take things for granted, and so lessens his interest. To this natural half-interest in the product of the solitary hours of another we attribute much of the conflict in the decisions. We remember what we have helped to mould, and are apt to forget that to which we have given passive assent. There is a difference between fighting a battle and reading about it. Much uncertainty comes from sheer forgetfulness of the court's decisions. The opinions as written under the prevailing system are confusing because replete with arguments attempting to convince which are not always consistent one with the other, and for no one of which any responsibility is assumed. Such opinions suggest the possibility of conflicts in principles, and invite experimental litigation. If a general discussion should follow close upon the study of the record by each judge, with his impression vivid, and his interest keen and freshly roused, the memory of one judge would supply the lapses of another. The general rule would be sure to find the exception properly declared. The general current would be stayed by due emphasis of special facts which might escape the notice of a solitary worker. When one Homer nods, another ought to be alert. If each justice takes a spirited, rather than a passive, part in a decision, his impression of the court's attitude will linger longer and more distinctly, and the concise opinion which would emanate from discussion would be remembered long after one less connected and more heavily laden with argument would be forgotten.

"We think that the number and length of opinions would be decreased by the adoption of this suggestion of the Bar Association. Opinions, and sometimes long ones, are now written only to reiterate well-settled principles. Such opinions usually are written for the purpose of calling the attention of fellow judges and of the profession to the thoroughness of the writer's research and the invulnerable strength of the conclusions in which he asks his brethren to concur,—all unnecessary had the line of controlling decisions been considered in an advance discussion and the case disposed of by mere reference to one or more of those decisions. An opinion emanating from discussion should, in smallest compass, announce the reasons for the decision with limited reference to authority, and in it there is no place for diversified argument. It need not be bulwarked as are the advance briefs which may or may not become opinions, for the conference would determine not only the destination, but also the route to be traveled.

"The profession in Alabama is hungering for opinions of the court. It is wearied by traveling through many pages of writing which are repudiated as opinions of the court by a concurrence limited to conclusions. Its patience has been taxed by long essays which conclude with an announcement such as this: 'The foregoing expresses the views of the writer, but other members of the court entertaining different views, the cause is affirmed.' It is hard to learn the law from the perusal of laborious statements of what is expressly declared not to be law. It has been said of decisions arrived at by advance parceling out of the records, 'What deference can we expect will be paid to the judgments of a court which habitually refrains from forming any opinion of its own as a court and contents itself with issuing the individual paper of each member in turn endorsed without recourse?' But worse than this, we have come in Alabama to where the court frequently declines to endorse even without recourse.

"The former achievements of this great court have not been absent from our minds. The fame and the epoch-making opinions of the incomparable justices who have adorned this bench rise unbidden before our mental vision. None realize more keenly than we that if some great disaster should sweep the results of their labors, and the record of their genius, from the libraries and minds of men, the science of jurisprudence would sustain a staggering blow, and the irreparable loss would be bewailed wherever the English tongue is heard or the common law administered. However, any argument that the suggestion which we bring should not be heeded because the distinguished career of this court was achieved without any such rule as that which we now advocate, would be fallacious. The tree flowers and fruits abundantly while the deadly parasite is almost imperceptibly sapping its vitality. The foundations, and much of the symmetrical superstructure of the common law, were constructed while the right to demand and enforce barbarous and superstitious procedures was recognized as sacred. Even the church has survived the thumbscrew, the rack, and the inquisition. They have survived because those excrescences have *not* survived. That the old order of a glorious era was defective, if not vicious, the inauguration of the new regime requiring the reading of the briefs, and, in effect, of the record, by each of the justices, under certain conditions, conclusively adjudicates."

"When we speak of the habit of a person we refer to his customary conduct, to pursue which he has acquired a tendency, from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early arising, for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen; nor could intemperate habits be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence." Field, J., in Knickerbocker L. Ins. Co. *v.* Foley, 105 U. S. 354.

LEASES OF ROOMS

IN the recent case of *Goldfoot* v. *Welch* (109 L. T. Rep. 820; (1914) 1 Ch. 213) Mr. Justice Eve was called upon to decide whether a demise of rooms, on two floors of a building, comprised the external walls of the rooms. The decision was, of course, necessarily a decision on the true meaning and construction of the particular document evidencing the demise, but it throws much light on the question of the rights of tenants of rooms, and the way in which leases of rooms and floors are generally to be construed. Having regard to the prevalent habit of flat-dwelling, and to the present practice of converting houses into maisonnettes, upper parts, and so forth, the law touching the rights of tenants of this form of property must necessarily become of increasing importance. As there is a marked paucity of judicial decision defining their rights, any reported case upon the subject will serve a useful purpose.

The Englishman's predilection for the soil, illustrated by the former prevalent form of building in towns—the vertical instead of the horizontal form of ownership and occupancy—is, no doubt, the reason for the undeveloped state of the law in this respect. That predilection led to the legal conception embodied in the maxim *Cujus est solum ejus est usque ad cœlum*. Rights of ownership in land and buildings are almost universally founded on this conception. So much so, that it is an open question to-day what the effect would be were an owner to erect a building and then to purport to convey the different floors to different grantees in fee simple. It is doubtful whether the grantee of a lower floor and his successors would be under a liability to take active steps to maintain the support of the superincumbent structure. It is, at any rate, certain that the law *ex naturæ* which governs the rights of owners of subterranean strata would not be applicable. For by that law the owner of a substratum must not use it so as to deprive the upper strata of the natural support which they derive from his property. In the case of a building, however, passive non-interference would of itself, in time, lead to a deprivation of support through natural causes. In short, there has been little or no development of the law along the lines of horizontal ownership. Yet the possible existence of absolute ownership in floors of a building, apart from ownership of the soil on which the building stands, appears to be judicially recognized. Thus Lord Justice Fry, in delivering the judgment of the Court of Appeal in the case of *Duke of Devonshire* v. *Pattinson* (20 Q. B. Div. 263, at pp. 273, 274), spoke of a grant and conveyance of a set of chambers in our Inns of Court, and of a flat in a house constructed in flats, as if it were very much the same thing as a grant of a seam of coal.

Whatever difficulties there may be with regard to absolute perpetual ownership in floors of buildings apart from the soil, it is an everyday occurrence for rooms and sets of rooms and floors to be demised for terms of years. There is not the same element of permanency in dispositions of this kind, so difficulties of the kind mentioned above do not rise. The rights of the tenant under a lease, under an agreement for a lease, or under a tenancy agreement necessarily depend on the terms of the document, and express provisions are usually inserted defining the respective rights and obligations of the parties. Suppose, however, that the express provisions include only, (*a*) a general definition of the demised premises, as, for instance, as such and such rooms on such a floor in such a building; (*b*) the term for which the premises are demised and the date from which the term is to run; and (*c*) the amount of the rent and the times and manner when and in which the rent is to be paid. What are the general rights of the tenant?

In the first place, such a demise would pass a right of way through the entrance hall and over the staircase. But it does not at all follow that every square foot of the entrance hall and staircase is subject to the right of way. Thus in the case of *Strick and Co. Limited* v. *City Offices Limited* (1906, 22 Times L. Rep. 667), where the lessees of a set of offices in a certain block of buildings claimed the right of preventing their lessors from altering the dimensions of the large entrance hall, on the ground that they (the lessees) were under the terms of the lease entitled to a right of way over every part of the hall, the court refused to accept this view, and held that the lease being silent as to the right of access over and through the hall, the lessees were only entitled to a reasonable user of the hall for the purposes of passage.

It would appear that if the rooms were let for some special purpose requiring an extraordinary amount of light, the demise might prevent the lessor from doing anything to diminish that light. As an authority for this proposition the dictum of Lord Parker of Waddington, when a judge of first instance, may be cited. In the case of *Browne* v. *Flower* (103 L. T. Rep. 557; (1911) 1 Ch. 219, at p. 226) his lordship laid it down that although possibly there might not be known to the law any easement of light for special purposes, still the lease of a building to be used for a special purpose requiring an extraordinary amount of light might well be held to preclude the lessor from diminishing the light passing to the lessee's windows, even in cases where the diminution would not be such as to create a nuisance within the meaning of the recent decisions. The case before the court was one in which the tenant of a flat claimed a mandatory injunction for the removal of an iron staircase erected by another tenant, with the lessor's consent, outside the plaintiff's windows and giving access to a flat above that of the plaintiff. It was alleged that the erection of the staircase both obstructed the light and interfered with the privacy of the plaintiff's flat. The action, however, failed.

Another important question for lessees of rooms is the right of affixing a name plate or other sign in the common entrance hall. It appears to be clear that the lessee ought expressly to stipulate for such an accommodation, for, except under special circumstances, he has no right whatever of using the walls of the entrance hall for such a purpose. The right is one which may be demised to him. The right of affixing and maintaining a name plate or signboard on another person's wall is an easement well known to the law. Thus in the case of *Moody* vs. *Steggles* (41 L. T. Rep. 25; 12 Ch. Div. 261) the court upheld a claim by a party, whose public-house stood back from the road, to the right of having a signboard fixed on the wall of a neighbor's house adjoining. The signboard had hung on the latter's house for upward of forty years. It was hung on hooks attached to the wall, and swung and creaked in the wind, a fact which made it obnoxious to the defendant. Again, in the case of *Hoard* v. *Metropolitan Board of Works* (29 L. T. Rep. 804; L. Rep. 9 Q. B. 296) the court held that an easement to have a signboard on another's property involves the ancillary right of entering on that property to repair the signboard. In that case, however, the signboard stood on a common opposite the claimant's public-house.

As already suggested, under special circumstances a right for a lessee of rooms to have his name up on the door or walls of

the common entrance might pass to him under his demise; and this, apparently, even in a case where the document of demise contains nothing more than the provisions (*a*), (*b*), and (*c*) mentioned above. This is a deduction which may be drawn from the decision of the Court of Appeal in the case of *Francis* v. *Hayward* (48 L. T. Rep. 297; 22 Ch. Div. 177).

In the last-mentioned case the plaintiff was the lessee of a house lying behind two other houses in a street. His house was approached by a passage running under the first floor of the other two houses. One half of this passage was under one house and the other half under the other. The three houses belonged to the same landlord. Over the entrance, where the passage opened into the street, there was a cement fascia some eight feet long, half of which was on the wall of one of the front houses, and the other half on the wall of the other. The number of the plaintiff's house and the name and business of its occupant for the time being had for many years been painted on the fascia. One of the front houses was demised to the defendant previously to the demise to the plaintiff. The defendant commenced to make certain alterations to his house which would have involved the obliteration of one half of the fascia. The plaintiff commenced the action to restrain any interference with the fascia. Mr. Justice Kay ordered the defendant to restore the fascia, and the defendant appealed. The Court of Appeal held that his lordship's decision was right, and treated the matter as a question of parcel or no parcel. In the opinion of the court the fascia was part and parcel of the plaintiff's premises, and half of it was not included in the demise of the front house.

From this case it may be inferred that where a name plate or signboard is obviously adapted for the purposes of the occupancy of a suite of rooms or other similar apartments and is used together with those apartments at the time of the demise, it may pass as parcel of the demised premises.

Another very important question for lessees of rooms is the question of their rights as regards external walls. It is on this point that the recent case mentioned at the commencement of this article is an authority.

In the case of *Carlisle Café Company* v. *Muse Brothers and Co.* (77 L. T. Rep. 515) the owner in fee simple of a freehold house demised the top floor of the building, and a reception room on the second floor, to a firm of photographers, who took the premises on the faith of their being allowed to use the outer walls for the purpose of advertising their business. The lower portion of the house was subsequently demised by the owner to the plaintiff company, who erected a large sign in such a manner as to cover to the height of some feet the lower portion of the outer wall of the photographers, who forcibly removed it and put up a sign of their own. At the trial it was argued that the outer walls were not included in the demise to the photographers, but Mr. Justice Byrne held that the demise included the outer walls of the house so far as those walls were solely appropriated to the rooms let. His lordship also held that the photographers had a right to use the outer walls in the way they had done.

In the more recent case of *Hope Brothers Limited* v. *Cowan* (108 L. T. Rep. 945; (1913) 1 Ch. 312, Mr. Justice Joyce laid it down as his opinion that unless there be an exception or a reservation or something in the contract to exclude it, *primâ facie* where there is a demise of a floor or a room or an office bounded in part by an outside wall, in that case the premises demised comprise both sides of the wall. "That," said his lordship, "has been more or less clearly already decided by Mr. Justice Byrne in *Carlisle Café Company* v. *Muse Brothers and Co.* (*sup.*)." In the case before Mr. Justice Joyce an office on the first floor of a building was demised to the defendants, who entered into various covenants for the repair of the inside parts of the office. The lessors covenanted to repair the external parts and to allow the lessees to affix trade signs approved by them, the lessors; while the lessees covenanted not to affix any sign or name plate without first obtaining the lessors' consent. The lessees, without obtaining the consent of the lessors, affixed flower-boxes outside the three windows of their office, and the lessors commenced an action to restrain them from doing so. The court, however, held, following *Carlisle Café Company* v. *Muse Brothers and Co.* (*sup.*), that the demise included the outside of the outer wall of the office, and that there was nothing in the lease to prevent the lessees doing what they had done.

In the recent case of *Goldfoot v. Welch* (*sup.*) rooms on two floors, with the exclusive use of a side entrance door and staircase, were let to the plaintiff, who agreed, amongst other things, to leave the interior of the demised rooms in a certain state of repair. The lessor subsequently fixed, or allowed to be fixed, certain advertisement boards on the outside of the walls of the demised rooms. The plaintiff took exception to these and requested the lessor to have them removed, but this was refused, and so the plaintiff commenced the action claiming an injunction to restrain the lessor from interfering with his possession of the external walls, and a mandatory injunction ordering the removal of the advertising boards. Mr. Justice Eve decided that the document of demise included the external walls of the first and second floors, and granted the mandatory injunction asked for.

These three authorities establish beyond all doubt that *primâ facie* the external walls of demised premises pass with the demise. In the case of *Carlisle Café Company* v. *Muse Brothers and Co.* (*sup.*) Mr. Justice Byrne decided this in the case of a demise of a studio and reception room. In *Hope Brothers Limited v. Cowan* (*sup.*) Mr. Justice Joyce did likewise in the case of an office; while in the most recent case Mr. Justice Eve came to the same conclusion in the case of a "room," demised as such.

One further point ought to be mentioned. From the nature of the case, where rooms, floors, suites, apartments, flats, or other portions of a whole building are demised, questions may readily arise with regard to disturbances from noise or other causes. The proximity to other occupants of the building renders this probable. Now, do not let the tenant think that his lessor's covenant for quiet enjoyment will avail him much in such a case. That covenant is a highly technical one which does not mean what a layman might reasonably think it means. It is only a covenant against physical disturbance, not metaphysical disturbance, as Lord Justice Buckley once remarked. "It appears to me," said Lord Parker of Waddington, when a judge of first instance, in the case of *Browne* v. *Flower* (*sup.*) referring to this covenant, "that to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises, and that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance, such as might arise from noise, invasion of privacy, or otherwise, is not enough."

The foregoing observations on the *primâ facie* rights of lessees of parts of buildings are necessarily of a general nature. The rights are, indeed, only *primâ facie* rights—that is to say, they are rights variable by circumstances—and they are always subject to the effect of the express provisions in the document of demise. It is almost superfluous to add that an intending lessee of property of this description would be much better advised to rely on express stipulation than on his *primâ facie* rights as outlined above.—*Law Times* (*London*).

POINTS IN LEGAL ETHICS

From the New York County Lawyers' Association Committee on Professional Ethics.

Question. A is a practicing attorney in this State. B is a member of the Bar of a Western State, but has moved to New York city. B's business in New York city is looking after his own investments. In the course of B's business a considerable amount of legal work comes to him, which he cannot handle because he is not a member of the bar of this State, and he desires to turn over all such legal matters to A for attention, upon condition that A will give B a portion of the fees received in such matters.

Is it the opinion of your Committee that it would be unprofessional for A to make such arrangement with B?

Answer. The Committee is of the opinion that any division of fees by a lawyer should be based upon a sharing of professional responsibility or of legal services, and no such division should be made except with a member of the legal profession associated in the employment as a lawyer. Any other division would appear to be a mere payment for securing professional employment, which is to be condemned.

If in the question propounded, the employment of B is by clients to whom he assumes responsibility by reason of his office as a lawyer in the Western State, we should not consider the division improper *per se*, though it is still possible that section 274 of the Penal Law might condemn it.

On the other hand, the question seems to mean that the employment is not the result of the Western lawyer's practice for clients in his own State, but rather the creation of employment as a lawyer in New York by reason of the Western man's activity as a business man in New York. If this interpretation be correct, we would consider the division improper: it might (under some circumstances which we do not assume to construe) even be a violation of section 274 of the Penal Law, which is as follows:

"Section 274. Buying demands on which to bring an action.

"An attorney or counselor shall not:

"1. Directly or indirectly, buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

"2. By himself, or by or in the name of another person either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this subdivision does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received."

Question. I have in my employ a clerk of mature years, who wishes to have cards printed showing that he is connected with my office. He has submitted to me a draft of such a card in the following form:

A..... B.....
with C..... D.....
Counsellor at Law
(address)
(telephone)

In the opinion of the Committee would such a card convey the impression that I am holding out this clerk as a lawyer, or is it, in the opinion of the Committee, objectionable for any other reason?

Answer. The Committee is not advised of any valid reason why the clerk, not being admitted to the bar, should use a card referring to the attorney; and it appears to be beneath the essential dignity of the professional position of the attorney to permit its use, while likelihood of its abuse seems obvious.

Question. At a social entertainment given by citizens who are members of a single race, to honor a distinguished man of their number, a program was published and circulated containing paid advertisements, of which one is the following:

Telephone..... Residence Phone.....
LARGE ACCIDENT, MATRIMONIAL & CRIMINAL ACTIONS A SPECIALTY
ALL MATTERS STRICTLY CONFIDENTIAL
.....(name)
Lawyer
.....(address).....
A ..... (stating advertiser's race) lawyer who is a ..... (stating race of distinguished guest) man's friend. Indorsed by leaders of the community. Has estimable record in all courts.

Is it the opinion of the Committee that this is proper professional advertising?

Answer. In the opinion of the Committee the advertisement set forth in the question is improper. (See Canon 27 of the American Bar Association.)

Question. It seems to be the prevailing practice for patent attorneys to run cards in their local papers, somewhat as follows:

PATENTS.
Richard E. Roe secures U. S. and Foreign Patents. ***** Bldg. *****

PATENTS.
Richard E. Roe, formerly Examiner U. S. Patent Office. Patents, Trade-Marks, Copyrights. **** Bldg. ****

Does the Committee deem this proper professional practice?

Answer. In the cards quoted, the advertiser does not describe himself as an attorney or counsellor at law. Patent attorneys are not necessarily attorneys at law, though attorneys at law may be patent attorneys, that is to say, either solicitors of patents or advisers in respect to patent matters. The Committee sees no impropriety in the advertisements, even though the advertiser is an attorney at law.

Question. A is a firm of attorneys making a specialty of patent practice. B is a lawyer employed by A under contract for a definite term. C is a manufacturer, a client of A.

C is interested in a line of inventions for which D has made numerous applications for patents, and a negotiation is pending between C and D for rights under D's patents.

C employs A to investigate D's patent applications and to attend to closing his transaction with D. In the course of his employment A sends B to D. B advises D that his report to C upon D's patent rights is favorable, but C delays closing the transaction.

B then informs D of a dispute between A and C over A's compensation, and B advises D that there are other concerns who would be purchasers of the inventions; that the applications should be carefully prosecuted; that the firm A is old and is about to break up; that young blood is going to take the business; that B's term of employment is almost expired; that A has not made a satisfactory proposition to him for continuing his employment; that B proposes to start in business

for himself, and if D will wait a short time until B's contract with A expires, B will interest himself in D's patents to the advantage of D.

D advises his solicitor E of these facts and that B has suggested that he be given associate powers of attorney to prosecute the applications at Washington. E at once draws an associate power of attorney in one of the cases and allows D to submit it to B for approval. B approves the power but informs D he does not want to take any powers of attorney until his employment with A has ceased.

1. Is B's conduct ethical?

2. Can E properly advise D that B's conduct is unprofessional and that the proposed association with B is not desired?

Answer. In the opinion of the Committee, B's conduct is improper, in that it violates the fidelity which he owes to A, and the confidence of A and C. In our opinion E can properly advise D that B's conduct is unprofessional.

Question. An attorney brings a suit upon a claim entrusted to him by a client. The debtor thereupon makes certain payments, but promptly, and before the collections are turned over to the client, claims that there has been an overpayment and demands a return to him of the payments which he has made. The client being advised of the fact urges his attorney to account to him for the payments, but the attorney instead presses the case for trial and meanwhile retains the money to await its determination. Is his course professionally proper, or should he turn over the money to his client upon his demand, or to the debtor upon his demand?

Answer. In the opinion of the Committee, the question does not state facts sufficient to enable the Committee to form a judgment on the legal rights involved; nor does the Committee ever assume to answer questions of law. From the standpoint of professional ethics, the Committee (merely from the facts stated) sees nothing improper in the attorney's conduct, assuming that he holds the money in a trust fund in a special account, and does not mingle it with his own funds.

Question. Will the Committee please advise me of its views respecting the professional propriety of the following advertisement inserted in local papers by an attorney at law, who was formerly the local attorney for the corporation mentioned therein:

"Having severed all relations between myself and the ..... Company, I am now in position to accept and prosecute all claims against said Company." (Attorney's signature.)

Answer. In the opinion of the Committee, the advertisement is highly improper. It is a direct invitation to prosecute claims against a former client, with the implied suggestion that the new clients will derive some advantage from the former confidential relation.

Question. I ask the opinion of the Committee upon the propriety of the following form of advertisement of a patent attorney, who is an attorney at law:

"Dear Sir:

"You need my services while I, in return, need your business.

"The manufacturer who would lead his competitors, and stay in the lead, must protect, by patent, all improvements he may make in his machinery of production, and also in the particular articles which he produces. Such patents must be as broad and comprehensive as the present state of the art of his particular line will permit, otherwise he will not be properly protected.

"While not the only one, I do claim that I can secure you protective patents on your inventions.

"If you have no consulting attorney in these matters, permit me to suggest that now is the time to supply that deficiency.

"You will find a patent attorney useful, not only when you have some improvement to patent, but also when you see some patented device which you would like to manufacture. That is where the knowledge of a skilled patent attorney will be invaluable to you in advising whether you can manufacture with impunity or not; or in suggesting slight changes in the patented article whereby the patent can be avoided.

"My references, which will be furnished upon request, are of the highest character, and my services are engaged by some of the largest inventors in the country.

"Trusting to hear from you in the near future and to be given an opportunity to show the worth of my services to you.

"Very truly yours,"

Answer. In the opinion of the Committee, it is improper for any attorney to advertise in the form stated in the question. The ethics of the legal profession forbid that a lawyer should advertise his skill as a shopkeeper advertises his wares. The Committee again calls attention to Canon 27 of the American Bar Association, regarding the solicitation of professional employment, quoted in Answer No. 46.

SOME TITLES OF CASES IN THE KENTUCKY REPORTS.

By GEORGE HOLBERT, of the Elizabethtown (Ky.) Bar.

A Bit Reminiscent.

Cain *v.* Cain, 29 R., 1163; 96 S. W., 1113.
Abell *v.* Abell, 1 Bibb, 149.
Daniel *v.* Judy, 14 B. Mon., 316.
Enoch *v.* Enoch, 7 R., 442.
Elisha, Ex Parte, 18 B. Mon., 675.
Jacob *v.* Jacob, 4 Bush, 110.
Haven *v.* Jordan, 13 R., 878.
Vice *v.* Eden, 113 Ky., 255.

Anent the High Cost of Living.

Bacon *v.* Bills, 6 R., 218.
Baker *v.* Cash, 113 S. W., 820.
Counts *v.* Kitchen, 87 Ky., 47.
Cheatham *v.* Leathers, 20 R., 1474; 49 S. W., 534.
Dunn *v.* Carpenter, 10 R., 494.
Oldham *v.* Sale, 1 B. Mon., 76.
Farmer *v.* Slack, 12 R., 319.
Gaines *v.* Poor, 3 Met., 503.
Nichols *v.* Scarce, 1 R., 270.

Quite Appropriate.

Barber *v.* Pate, 2 Mon., 5.
Beard *v.* Sharp, 100 Ky., 606.
Long *v.* Beard, 20 R., 1036; 48 S. W., 158.
Cotton *v.* Taylor, 4 B. Mon., 357.
Hogg *v.* Baker, 17 R., 577; 31 S. W., 726.
Miller *v.* Mills, 7 R., 221.
Hughes *v.* Wood, 20 R., 977; 48 S. W., 152.
Waters *v.* Barral, 2 Bush, 598.
Smith *v.* Harrow, 1 Bibb, 97.
Spurr *v.* Batchelor, 102 Ky., 606.
Violett *v.* Vale, 1 Bibb, 144.
Flood *v.* Wall, 10 R., 948; 11 S. W., 7.
Coffee *v.* Cook, 2 Ky. Op., 22.

Starting A Rough House.
Fite *v.* Fite, 110 Ky., 197.
Lynch *v.* Bullet, Hard., 314.
Gunn *v.* Strong, 20 R., 650; 47 S. W., 339.
Savage *v.* Bulger, 25 R., 763; 76 S. W., 361.
Slaughter *v.* Ditto, 33 R., 5; 108 S. W., 882.
Dye *v.* Knox, 1 Bibb, 573.
Board *v.* Head, 3 Dana, 489.
Bowman *v.* Castleman, 4 Litt., 303.

Smooth Sailing.
Shipp *v.* Swan, 2 Bibb, 82.
Gayle *v.* Rigg, 27 R., 618; 85 S. W., 1172.
Armstrong *v.* Helm, 13 R., 460.

What Wind of Destiny Ever Blew These into Court?
Dovey *v.* Lam, 117 Ky., 19.
Doll *v.* Reed, 12 R., 300; 13 S. W., 1081.
Susan *v.* Ladd, 6 Dana, 30.
Dolfinger *v.* Fishback, 12 Bush, 474.
Hart *v.* Fanny Ann, 6 Mon., 49.
Ruby *v.* Grace, 2 Duvall, 540.
Meek *v.* Faly, 2 J. J. Mar., 329.
Grant *v.* Settle, 1 R., 344.

Back to the Soil.
Gully *v.* Grubbs, 1 J. J. Mar., 387.
Hill *v.* Mudd, 9 R., 59.
Marsh *v.* Current, 6 B. Mon., 493.
Boggs *v.* Bush, 137 Ky., 95.
Lot *v.* Parish, 1 Litt., 11.
Stone *v.* Clay, 103 Ky., 314.
Ferry *v.* Street, 14 B. Mon., 287.
Gardner *v.* Moss, 28 R., 1216; 91 S. W., 1148.

Color Scheme.
White *v.* Green, 3 Mon., 155.
Bright *v.* Dunn, 12 R., 689; 15 S. W., 7.
Chestnut *v.* Green, 27 R., 838; 86 S. W., 1122.
White *v.* Brown, 1 Dana, 104.
Green *v.* Bright, 7 R., 162.
Blackwell *v.* White, 7 R., 680.

Why, Of Course.
Tapp *v.* Knock, Affirmed, 89 Ky., 414.
Swift *v.* Hopper, Reversed, 1 B. Mon., 261.
Gay *v.* Haggard, Reversed, 133 Ky., 425.
Thornberry *v.* Berry, Reversed, 2 Mar., 327.
American National Bank *v.* Smallhouse, Reversed, 113 Ky., 147.
Smallwood *v.* Woods, Affirmed, 1 Bibb, 542.

But How Did All This Happen?
Bright *v.* Guy, Affirmed, 28 R., 57; 88 S. W., 1096.
Allnut *v.* Winn, Reversed, 3 J. J., Mar., 304.
Fellows *v.* King, Reversed, 25 R., 1669; 78 S. W., 468.
Burns *v.* Sparks, Affirmed, 20 R., 688; 82 S. W., 425.
Monarch *v.* Cowherd, Affirmed, 114 S. W., 276.
Greening *v.* Fox, Reversed, 12 B. Mon., 187.
Short *v.* Moore, Reversed, 19 R., 1125; 43 S. W., 211.
Nichols *v.* Nunn, Affirmed, 25 R., 745; 76 S. W., 1103.
House *v.* Greathouse, Reversed, 10 R., 317.

These Must Have Been Close Cases.
Sharp *v.* Head, 11 B. Mon., 277.
Stout *v.* Wright, Litt. Sel. Cas., 482.
Swift *v.* Wiley, 1 B. Mon., 114.
Hedger *v.* Ward, 15 B. Mon., 106.
Moore *v.* Large, 20 R., 409; 46 S. W., 508.
Duty *v.* Biggstaff, 9 R., 287.
Rash *v.* Cheatham, 9 R., 403.
Young *v.* Small, 4 B. Mon., 220.
Craft *v.* Bates, 20 R., 1418; 49 S. W., 436.
Blythe *v.* Hardy, 3 Ky. Op., 693.

Take Your Choice.
Knut *v.* Knut, 22 R., 972; 58 S. W., 583.
Tanner *v.* Skinner, 11 Bush, 120.
Hatcher *v.* Fowler, 1 Bibb, 337.
Cook *v.* Fryer, 3 R., 612.
Haggard *v.* Rout, 6 B. Mon., 247.
Head *v.* Manners, 6 Mon., 185.
Strange *v.* Gess, 11 Ky., 640.
Rau *v.* Boyle, 5 Bush, 253.

The Whole Year Round.
January *v.* January, 7 Mar., 542.
Winters *v.* January, Litt. Sel., Cas., 13.
Munday *v.* Munday, 21 R., 693; 52 S. W., 966.
May *v.* May, 29 R., 1033; 96 S. W., 840.
Weathers *v.* Mudd, 12 B. Mon., 112.
Early *v.* Rains, 28 R., 415; 89 S. W., 289.
Summers *v.* Green, 4 J. J. Mar., 137.
Leaf *v.* Leaf, 12 R., 47.
Ice *v.* Ice, 26 R., 1065; 83 S. W., 135.

Everybody is Doing It.
Sadler *v.* Glover, 5 Dana, 551.
Barber *v.* Taylor, 9 Dana, 84.
Miller *v.* Cropper, 16 R., 395.
Cooper *v.* Hatter, 1 J. J. Mar., 357.
Carpenter *v.* Shepherd, 4 Bibb, 501.
Mason *v.* Baker, 1 Mar., 208.
Taylor *v.* Farmer, 81 Ky., 458.
Harper *v.* Baker, 3 Mon., 421.
Butler *v.* Cooper, 6 J. J. Mar., 29.
Bard *v.* Stewart, 3 Mon., 72.
Marshall *v.* Dean, 4 J. J. Mar., 583.
Brewer *v.* Fowler, 19 R., 1992.

Menu.
Hawes *v.* Rice, 10 Bush, 431.
Lam *v.* Fox, 5 B. Mon., 94.
Lemon *v.* Cherry, 1 Bibb, 253.
Bullock *v.* Bird, 2 Mar., 322.
Burnham *v.* Oldham, 7 Mon., 652.

Sporting Column.
Fish *v.* Hunt, 81 Ky., 584.
Hunt *v.* Fox, 5 B. Mon., 327.
Wolf *v.* Hunter, 15 R., 846.
Lively *v.* Ball, 8 Dana, 312.
Eaton *v.* Hunt, 20 R., 860; 47 S. W., 763.
Fisher *v.* Music, 24 R., 1913; 72 S. W., 787.

And the Band Played On.
Gayheart *v.* Cornett, 19 R., 1052; 42 S. W., 730.
Fidler *v.* Hall, 2 Met., 461.
Harper *v.* Harper, 85 Ky., 160.
Casey *v.* Jones, 2 Litt., 301.

Anybody's Old Cases.
Folks *v.* Folks, 107 Ky., 561.
Neighbors *v.* Neighbors, 112 Ky., 161.

Your Very Own.
Self *v.* Self, 1 R., 356.

Cases of Interest.

RIGHT OF WIDOW KILLING HUSBAND TO SHARE IN HIS PROPERTY.—Indiana has a statute providing that "no person who unlawfully causes the death of another and shall have been convicted thereof, or aids or abets in such unlawful killing of another, shall take by devise or descent any part of the property, real or personal, owned by decedent at the time of his or her death." In In re Mertes' Estate, (Ind.) 104 N. E. 753, it was held that the statute did not prevent a widow who had been convicted of killing her husband from recovering a statutory allowance which widows were entitled to in Indiana, as the allowance did not pass to her by reason of any law of descent but was a preferred claim payable out of the personal estate of the deceased husband, if sufficient, and, if insufficient, then out of the real estate. The court said: "The act in question is confined in 'devise' and 'descent,' and could not be made to apply in this case, without reading something into the statute which was not included therein by the legislature."

ACQUISITION OF DOMICIL BY WIFE SEPARATED FROM HUSBAND.—It is of course well settled that a wife may acquire a domicil in a state other than that in which her husband is domiciled for the purpose of obtaining a divorce, and in Williamson *v.* Osenton, 34 U. S. Sup. Ct. Rep. 442, it was held that the domicil obtained was sufficient to enable her to maintain an action of damages against a third person in the federal courts, the defendant being a citizen of the state in which her husband lived. Mr. Justice Holmes for the court said: "The only reason that could be offered for not recognizing the fact of the plaintiff's actual change, if justified, is the now vanishing fiction of identity of person. But if that fiction does not prevail over the fact in the relation for which the fiction was created there is no reason in the world why it should be given effect in any other. However it may be in England, that in this country a wife in the plaintiff's circumstances may get a different domicil from that of her husband for purposes of divorce is not disputed and is not open to dispute. . . . This she may do without necessity and simply from choice, as the cases show, and the change that is good against her husband ought to be good as against all. In the later decisions the right to change and the effect of the change are laid down in absolute terms. . . . We see no reason why the wife who justifiably has left her husband should not have the same choice of domicil for an action for damages that she has against her husband for a divorce."

LIABILITY OF MANUFACTURER OF BEVERAGE TO CONSUMER WHO IS MADE SICK BY REASON OF FOREIGN SUBSTANCE THEREIN.—An amusing case applying a well-settled rule of law is Jackson Coca-Cola Bottling Co. *v.* Chapman, (Miss.) 64 So. 791, wherein a manufacturer of coca-cola was held liable in damages to one who had purchased a bottle of the beverage from a retailer and was made sick by reason of the fact that after partially consuming the coca-cola he detected the presence in the bottle of a foreign substance, to wit a decomposed mouse. Judge Reed wrote the opinion of the court, and he took advantage of the opportunity afforded by the ususual character of the case to make it evident that he has a sense of humor. His opinion is as follows: "A 'sma' mousie' caused the trouble in this case. The 'wee, sleekit, cow'rin', tim'rous beastie' drowned in a bottle of coca-cola. How it happened is not told. There is evidence for appellant that its system for cleansing and filling bottles is complete, and that there is watchfulness to prevent the introduction of foreign substances. Nevertheless the little creature was in the bottle. It had been there long enough to be swollen and undergoing decomposition when the bottle was purchased from a grocer and opened by appellee. Its presence in the bottle was not discovered until appellee had taken several swallows. An odor led to the discovery. Further events need not be detailed. Appellee says he got sick. Suffice it to say he did not get joy from the anticipated refreshing drink. He was in the frame of mind to approve the poet's words:

> 'The best-laid schemes o' mice an' men
> Gang aft agley
> An' lae'e us nought but grief an' pain,
> For promis'd joy!'

The record discloses sufficient evidence to sustain the jury's verdict for appellee. There is no error for reversal. Appellant company bottled the coca-cola for the retail trade to be sold to the general public as a beverage refreshing and harmless. The bottle in this case was purchased by the grocer from appellant. We find the law pertinent to this case clearly stated by Judge Candler in the case of Watson *v.* Augusta Brewing Company, 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1178, 110 Am. St. Rep. 157, as follows: 'When a manufacturer makes, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage, which, if taken into the human stomach, will be injurious.' In that case it is further held that this duty the bottler owes to the general public for whom his drinks are intended as well as to the retailer to whom he sells."

LIABILITY OF OWNER OF MONKEY FOR INJURIES INFLICTED BY THE ANIMAL ON A PERSON.—A monkey must not be permitted to run at large, and if it escapes from a cage and does harm to persons by biting and scratching them, the owner is answerable in damages for the hurt it has done. Phillips *v.* Garner, Miss. 64 So. 735, wherein the court said: "The case of May *v.* Burdett, Eng. Rep., Full Reprint, vol. 115, p. 1213, 9 Q. B. 101, is a leading case on this subject. In that case a woman was bitten by a monkey, and the owner held liable. It was decided therein that the owner, if he would keep the animal, was bound to keep it secure at all events. In 1 Hale's Pleas of the Crown, 430, the author, in referring to the liability of the owner for injuries done by a wild animal, says: 'Though he has no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damages, and so I knew it adjudged in Andrew Baker's Case, whose child was bit by a monkey, that broke his chain and got loose. And therefore, in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages.' In the case of Molloy *v.* Starin, 191 N. Y. 21, 83 N. E. 588, 16 L. R. A. (N. S.) 445, 14 Ann. Cas. 57, the court said that the liability of an owner of a wild animal is absolute, and he is bound to keep the animal secure, or he must suffer the penalty for his failure to do so in making compensation for the mischief done, citing Muller *v.* McKesson, 73 N. Y. 195, 29 Am. Rep. 123. We take the following from the note to the case of Molloy *v.* Starin, in 14 Ann. Cas. 57: 'In an action against the owner or keeper of a wild animal for injuries inflicted by such animal, it is an established rule of pleading that it is not necessary to aver negli-

gence in the owner or keeper, as the gist of the action is the keeping of the wild animal, and the burden is upon the owner or keeper to refute the implied imputation of negligence arising from having the animal in his possession. . . . And it has been held that it is not necessary to show that the owner of a wild animal was negligent in permitting the animal to be at large, as he is bound to keep it secure at his peril. . . . It has been held that it is not necessary to show that the owner had knowledge of the vicious nature of the wild animal causing injury, as he is conclusively presumed to have had such knowledge.'"

BEQUEST TO "HUSBAND" AS INCLUDING ONE WHO HAS OBTAINED A CONDITIONAL JUDGMENT OF DIVORCE.—In Rogers *v.* Hollister, (Wis.) 146 N. W. 488, which was an appeal from a judgment in proceedings instituted by one Fred L. Rogers for letters of administration upon the estate of Martha Alice Rogers, deceased, the question in dispute was his right to the letters in view of the facts shown which were in substance as follows: During the life of the said Martha, the applicant for the letters, who was her husband, commenced an action for divorce, and while the action was pending Martha made her will which contained the following: "If Fred L. Rogers is my husband at my decease, I give, devise and bequeath to him all of my personal property absolutely, and the right to use and occupy my residence where I now reside for and during his natural life, providing he is my husband at the time of my decease. I nominate Fred Rogers, my husband, executor of this my will without bonds, providing he is my husband at my decease." The divorce action resulted in an interlocutory judgment being entered for the plaintiff with a provision that it should not become final until the expiration of a year. Before the year elapsed the said Martha died. On these facts it was held that Fred L. Rogers was not entitled to letters of administration, as he was not the husband of Martha Rogers deceased within the meaning of the will. The court said: "While the divorce action had been commenced shortly before the will was executed, it is plain from the record that Martha was opposed to the divorce and desired a reconciliation; but the appellant persisted, and the judgment was entered contrary to the wish of the wife. Whether the judgment dissolved the marriage contract when entered, subject to modification within the year, or whether it became effectual to dissolve the contract at the end of the year, it was at least a conditional judgment, which without further action upon it would automatically become final and conclusive at the end of one year from its entry. So it would seem that when Martha Alice Rogers made her will bequeathing property to Fred L. Rogers if he should be her husband at the time of her death, she meant that she gave the property to him if no divorce was granted. It does not seem that she intended to give her property to him if he had a judgment of divorce entered against her which would at least be final and conclusive one year from the date of entry, unless otherwise ordered. She doubtless meant a 'duly commissioned husband' with all the rights and privileges, and charged with all the duties and obligations of a real husband in law and in fact. Whatever the effect of the judgment may have been under the statute when entered, it at least impaired the relation which formerly existed between Fred L. Rogers and Martha Alice Rogers as husband and wife, and severed the social if not the legal relation which formerly existed between them."

BARBED WIRE FENCE AS A NUISANCE.—In Barr *v.* Green, (N. Y.) 104 N. E. 619, which was an action by an infant to recover damages for injuries received from running into a barbed wire fence, the facts were as follows: The defendant was the owner of a farm which adjoined a schoolhouse lot on the south, east, and north sides thereof. He erected ordinary fence posts by setting them in the ground twelve feet apart on or near the division line between his lands and the lands of the school district, and along the highway adjoining his lands north and south of the schoolhouse lot. Some time thereafter he fastened a barbed wire on said posts, about four feet from the ground, along said highway and around the three sides of said lot. The barbs on the wire were six inches apart. He left the fence in such incomplete condition, intending, as he asserted, later to place on said posts two lines of wire under the one fastened thereon, and also to fasten a line of poles on the posts above the top wire. The plaintiff was a child eleven years old and an attendant at the public school in the district. She was absent from school the afternoon that the wire was fastened to the posts as stated, but came to the school the next day, and at an intermission in the school work ran from the door of the schoolhouse southerly, looking over her shoulder and calling as she ran to another attendant of the school, and while so running, and without knowing that the wire had been fastened on the posts, her neck came in contact with the barbed wire and it was to some extent lacerated, and she suffered the injuries for which the action was brought. On these facts the Court of Appeals reversed a judgment for the plaintiff and granted a new trial, holding that the trial court erred in failing to leave to the jury the question whether the defendant was negligent in the erection of the barbed wire fence, and leaving the same unmarked and unprotected by a bar of wood, as provided by statute, or otherwise. It was further held that the question whether the plaintiff was guilty of contributory negligence was also under the circumstances disclosed a question of fact for the jury. The court, speaking through Chase, J., said: "We are of opinion that a barbed wire fence is not a nuisance as a matter of law. Whether it is or is not negligence to erect and maintain a barbed wire fence is a question of fact. A person may or may not be negligent in building or maintaining such a fence, depending upon the place where the same is erected or maintained and the circumstances affecting the question whether such a fence would in any way constitute a source of danger. The practice of children playing about a school yard during the hours of intermission is well known, and in this case it appears that the lands adjoining the schoolhouse grounds had theretofore been unfenced and it had been the custom of the children attending the public school to run from the schoolhouse grounds upon the lands of the defendant. The plaintiff and other children had also been accustomed to go upon the lands of the defendant to pick strawberries. It was the plaintiff's intention to go upon the defendant's lands and pick strawberries at the time she was injured. The contracted lines of the schoolhouse lot and the fact that his lands adjoining such lot had previously remained unfenced were known to the defendant."

VALIDITY OF LABOR CONTRACT WHEREIN AN EMPLOYER OF LABOR AGREED TO EMPLOY MEN OF ONE ONLY OF TWO LABOR UNIONS.—In Hoban *v.* Dempsey, (Mass.) 104 N. E. 717, it appeared that the plaintiffs were members of a labor union of longshoremen. There were two groups of defendants, the one members of a different labor union of longshoremen, and the other representatives of certain transatlantic steamship companies. The plaintiffs sought to enjoin the defendants from proceeding with an agreement which consisted of thirty articles covering most, if not all, of the conditions of labor likely to arise in the course of such employment. One paragraph pro-

vided in substance that all longshoremen employed by the contracting transatlantic steamship lines should be members of the defendant union whenever such men were available, and whenever such men were not available, then other men might be employed until the defendant union could supply men, but in any event men not members of the defendant union might be employed until the end of the day. It was contended that this clause was so illegal that performance of the contract ought to be enjoined at the instance of third parties. A trial was had before a single justice who, at its conclusion, found that the "contract was freely and fairly entered into between the contracting parties without any purpose or motive on the part of the representatives of the International Longshoremen's Association [the defendant union] to injure the plaintiffs or to coerce them into joining its union or unions, although I am satisfied that the legal effect of the contract may deprive the plaintiffs of employment by the transatlantic steamship lines," and ruled as matter of law that the bill could not be maintained and entered a decree dismissing it. This decree was affirmed on appeal. The opinion written by Chief Justice Rugg was in part as follows: "This is a simple case where employers and a union of employees have made an agreement freely and without any kind of constraint, the terms of which do not require the breaking of contractual relations with any one, to the end that all the work of a specified kind be given to the members of a union so far as they are able to do it, for a limited period of time. If a sufficient number of union men are not supplied, the employer may hire whom he chooses. For aught that appears, the contract may have followed competition between rival groups of workmen to secure the work. The inducements which moved both parties to the making of the contract were those ordinarily accompanying the kind of competition which is within the bounds of law. There was no fraud, intimidation, molestation, threat or coercion, covert or open, acting either upon the body or mind or property interests of the contracting parties. The incitements to the contract were those of business advantage alone. The terms of the contract do not preclude the employers from procuring workmen from any source if the defendant union does not supply them constantly with a sufficient number of competent longshoremen. But on the contrary, they are given this right expressly. The explicit finding of the single justice was to the effect that a desire or intention to harm the plaintiffs by depriving them of the chance of work, or to compel them to join the defendant union, or to do them any other injury, was not a part of the design of the contract nor one of the influences operating upon the minds of the parties in executing it. Whatever loss may come to them is an incidental result and not an essential element of a contract whose dominant purpose is within the limits of lawful bargaining. No economic pressure, threat of business loss, or interference with absolute freedom of action was exercised in order to procure the making of the contract. There was nothing of the boycott about the contract, for an essential element of the boycott is intentional injury to somebody."

VALIDITY OF ORDINANCE PROHIBITING USE OF TOBACCO IN PUBLIC PLACES IN MUNICIPALITY.—The Supreme Court of Illinois has come to the rescue of users of tobacco in the city of Zion, Illinois, by holding in City of Zion *v.* Behrens, (Ill.) 104 N. E. 834, that an ordinance of that city prohibiting persons from having in their possession, or using, tobacco while in the public streets or places of the municipality was invalid. In an opinion replete with sound sense and wisdom the court says: "An extended brief and argument have been filed by defendant in error, in which it is sought to sustain the validity of the ordinance under the police power granted to cities and villages. Many cases decided by this court sustaining various ordinances and statutes under the police power are cited and relied upon. None of the cases heretofore decided by this court go to the extent of sustaining the power of a city to pass an ordinance forbidding an act under all circumstances which can only be offensive or harmful to others under certain conditions. Recognizing that tobacco smoke is offensive to many persons, and in exceptional cases harmful to some, we have no doubt that power exists to prohibit smoking in certain public places, such as street cars, theaters, and like places where large numbers of persons are crowded together in a small space. But this is quite a different matter from prohibiting smoking on the open streets and in parks of a city, where the conditions would counteract any harmful result. The personal liberty of the citizen cannot be interfered with unless the restraint is reasonably necessary to promote the public welfare. The only case that has been called to our attention that lends any support to the defendant in error's contention is Commonwealth *v.* Thompson, 12 Met. (Mass.) 231. In that case the Supreme Court of Massachusetts sustained a statute which made it an offense to smoke or have in one's possession a lighted pipe or cigar on any of the streets of the city of Boston. In that case the law was upheld on the ground that it tended to protect the city against damage from fire. This seems to be the only case in the United States where an ordinance or statute forbidding smoking of tobacco, in any form, on streets or public grounds, has been sustained. While we have a very high regard for the decisions of the Supreme Court of Massachusetts, still we are constrained in this instance to decline to follow the doctrine of the Thompson case. In State *v.* Heidenhain, 42 La. Ann. 483, 7 So. 621, 21 Am. St. Rep. 388, the Supreme Court of Louisiana sustained an ordinance which forbade smoking in street cars as a nuisance, but that court carefully limited its decision to the conditions named in the ordinance. In the course of its opinion the court said: 'Smoking in itself is not to be condemned for any reason of public policy. It is agreeable and pleasant, almost indispensable, to those who have acquired the habit, but it is distasteful and offensive, sometimes hurtful, to those who are compelled to breathe the atmosphere impregnated with tobacco in close and confined places.' See 3 McQuillin on Mun. Corp. §902. It has been held that cities and villages may pass ordinances regulating, and providing for licensing, the sale of cigarettes under a general delegation of power authorizing the passage of all adequate police regulations which may be necessary or expedient for the preservation of the health or the suppression of disease. Gundling *v.* Chicago, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230. The holding in the Gundling case was affirmed by the United States Supreme Court, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. ed. 725. The Supreme Court of Tennessee held that cigarettes are not legitimate articles of commerce, within the protection of the Constitution of the United States, because they possess no virtue and are bad inherently. Austin *v.* State, 101 Tenn. 563, 48 S. W. 305, 50 L. R. A. 478, 70 Am. St. Rep. 703 That decision was affirmed by the United States Supreme Court, 179 U S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224. Notwithstanding the smoking of cigarettes, especially by young persons, is regarded as more offensive and harmful than the use of tobacco in any other form, still the Supreme Court of Kentucky held an ordinance void which forbade the 'smoking of cigarettes within the corporate limits' of a city. Hershberg *v.* Barbourville, 142 Ky. 60, 133 S. W. 985, 24 L. R. A. N. S. 141, Ann. Cas. 1912D, 189. See also 3 McQuillin on Mun. Corp. § 921, and cases there cited.

It will be seen that the ordinance in question cannot be sustained on the ground that it tends to protect the property of the city from damage by fire. If the ordinance were limited to places where quantities of highly combustible materials were collected it would be less objectionable. In the broad language in which the ordinance is enacted it is apparently an attempt on the part of the municipality to regulate and control the habits and practices of the citizen without any reasonable basis for so doing. The ordinance is an unreasonable interference with the private rights of the citizen and must be held void."

CONSTITUTIONALITY OF STATUTE LIMITING HOURS WITHIN WHICH WOMEN MAY BE EMPLOYED.—In Massachusetts there exists a statute which provides that no child or woman shall be employed in laboring in any manufacturing or mechanical establishment more than ten hours in any one day, unless a different apportionment of the hours of labor is made for the sole purpose of making a shorter day's work for one day of the week, and in no case shall the hours of labor exceed fifty-six in a week. It also provides as follows: "Every employer shall post in a conspicuous place in every room in which such persons are employed a printed notice stating the number of hours' work required of them on each day of the week, the hours of commencing and stopping work, and the hours when the time allowed for meals begins and ends. . . . The employment of such persons at any time other than as stated in said printed notice shall be deemed a violation of the provisions of this section," punishable by a fine of not less than fifty dollars nor more than one hundred dollars. This statute has recently been held constitutional by the United States Supreme Court in Riley *v.* Com., 34 U. S. Supreme Court Reporter 469. Mr. Justice McKenna writing the opinion of the court states the objections to the statute and answers them in turn. In part he says: "The first contention of plaintiff in error is that the statute restricts the right to sell and buy labor, and therein infringes the liberty of contract assured by article 14 of the Amendments to the Constitution of the United States. The contention is untenable expressed in this generality. In Muller *v.* Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957, against a similar contention, a statute of Oregon was sustained which prohibited the employment of women in mechanical factories or laundries working more than ten hours during any one day, with power, as in the Massachusetts statute, to apportion the hours through the day. But special objections are made which, it is contended, make Muller *v.* Oregon inapplicable. The prohibition of the statute under review, it is said, 'is not restricted to times and places which relate to and naturally and logically affect a woman's health, safety, or morals, or the welfare of herself or the public.' Such are the conditions necessary to the validity of a statute restricting employment, it is contended, and that those conditions are not satisfied by the statute. Section 48, it is urged, not only prohibits the employment of women more than ten hours a day, but that (quoting the section) 'the employment of such person [woman] at a time other than as stated in said printed notice, shall be deemed a violation of the provisions of this section.' The provision is arbitrary and unreasonable, it is insisted, in that it requires the employer to post a notice in a room in which women and minors are permanently employed in laboring only six hours a day, and makes it a crime if such person is allowed to work for five minutes at a time other than as stated in the notice. But if we might imagine that an employer would so enlarge the restrictions of the statute, or be charged with violating it if he did, we yet must remember that, as it was competent for the state to restrict the hours of employment, it is also competent for the state to provide administrative means against evasion of the restriction. . . . Neither the wisdom nor the legality of such means can be judged by extreme instances of their operation. The provision of section 48 cannot be pronounced arbitrary. As said by the Supreme Judicial Court, the statute 'requires the hours of labor to be stipulated in advance, and then to be followed until a change is made. It does not by its terms establish a schedule of hours. This is left to the free action of the parties. Nor does it in the sections now under consideration restrict the right to labor to any particular hours. . . . It simply makes imperative strict observance of any one table of hours of labor while it remains posted. The end of the statute is the protection of women within constitutional limits, and the requirement that the hours posted in the notice shall be followed is a means to effectuate the attainment of that end.' [210 Mass. 394, 97 N. E. 367, Ann. Cas. 1912 D, 388.] In other words, the purpose of the posting of the hours of labor is to secure certainty in the observance of the law, and to prevent the defeat or circumvention of its purpose by artful practices."

News of the Profession.

THE ALABAMA STATE BAR ASSOCIATION will meet in Montgomery, Ala., on July 10 and 11.

THE NORTH DAKOTA BAR ASSOCIATION will meet in annual session at Grand Forks, N. D., on August 11.

NEGRO NAMED MUNICIPAL JUDGE.—Robert H. Terrell, a negro, has been appointed municipal judge for the District of Columbia.

REAPPOINTED CITY ATTORNEY.—James W. Booth has been reappointed city attorney of St. Petersburg, Fla., for the fourth time.

NEW COUNTY JUDGES IN BROOKLYN.—Governor Glynn of New York has appointed Robert H. Roy and John F. Hylan to the bench of the County Court of Kings County.

IOWA STATE BAR ASSOCIATION.—The twentieth annual convention of the Iowa State Bar Association will be held at Burlington, Ia., on June 25 and 26.

MADE MEMBER OF PANAMA MIXED CLAIMS COMMISSION.—L. M. Kagy, a lawyer of Salem, Ill., has been appointed by Secretary Bryan as a member of the Panama Mixed Claims Commission.

APPELLATE JUDGE NAMED.—Circuit Judge William B. Schofield of Marshall County has been appointed a member of the Illinois Appellate Court to succeed Judge Solon Philbrick, deceased.

DISTRICT OF COLUMBIA JUDGE TO RETIRE.—Justice Job Barnard will retire as a member of the District of Columbia Supreme Court on June 8, when he will reach the age of seventy years.

NAMED UNITED STATES ATTORNEY IN ILLINOIS.—President Wilson has appointed Edward C. Knotts of Carlinsville, Ill., to be United States Attorney for the Southern District of Illinois.

NEW MINNESOTA JUDGE NAMED.—Daniel Fish, city attorney of Minneapolis, has been appointed by Governor Eberhart as judge of the Hennepin County District Court, to succeed Judge Wilbur F. Booth.

ASSISTANT ATTORNEY GENERAL RESIGNS.—Judge Arthur J. McCabe of Topeka, Kan., assistant attorney general under Attorney General McReynolds at Washington, has resigned from his position.

CHANGE IN IOWA DISTRICT COURT.—Judge C. G. Lee has resigned from the Iowa District bench, and John L. Kamrar of Webster City has been commissioned by Governor Clarke to fill the vacancy.

BECOMES UNITED STATES MARSHAL.—Arthur Perry Carpenter, a well-known lawyer of Brattleboro, Vt., has been appointed by President Wilson to the office of United States marshal for the District of Vermont.

APPOINTED UNITED STATES DISTRICT ATTORNEY.—Stephen C. Perry, of Portland, Me., has been appointed United States District Attorney for the District of Maine, in succession to Robert T. Whitehouse, term expired.

NEW YORK STATE BAR ASSOCIATION.—The executive committee of the New York State Bar Association has selected Buffalo as the meeting place for the next annual convention, which will be held on January 15 and 16, 1915.

NEW MUNICIPAL JUDGE IN CHICAGO.—Governor Dunne of Illinois has appointed Edmund K. Jarecki, a Polish lawyer, to the Chicago Municipal Court bench to fill the vacancy caused by the resignation of Judge Fred Fake.

RESIGNS FROM BENCH IN IOWA.—Judge Clarence Nichols, of Vinton, judge of the Eighteenth judicial district of Iowa, comprising Marshall, Tama and Benton counties, resigned from the bench on June 1 to re-engage in the private practice of law.

COLORED ATTORNEY APPOINTED DELEGATE.—Attorney W. A. Carter, colored, of Cincinnati, has been appointed by Governor Cox of Ohio as a delegate to the National Negro Educational Congress, to be held at Oklahoma City, Okla., July 7 to 10.

MADE FEDERAL JUDGE IN MINNESOTA.—Judge Wilbur F. Booth, of the Minnesota District Court, has been appointed to the position of judge of the United States District Court at Minneapolis, to fill the vacancy caused by the death of Judge Charles A. Willard.

THE MICHIGAN STATE BAR ASSOCIATION will hold its next annual meeting on June 23, 24 and 25. It is expected that the principal speaker will be Francis E. Baker, presiding judge of the United States Circuit Court of Appeals, Seventh Circuit, and former judge of the Supreme Court of Indiana.

FEDERAL JUDGE DIES IN PENNSYLVANIA.—Judge James B. Holland of the United States District Court for the Eastern District of Pennsylvania, died at Conshohocken, near Philadelphia, on April 24. Judge Holland was fifty-four years of age and had been on the Federal bench since 1904.

BECOMES CHIEF JUSTICE OF ILLINOIS SUPREME COURT.—Judge James H. Cartwright is chief justice of the Illinois State Supreme Court, having succeeded to the honor held the past year by Judge George A. Cook. Judge Cartwright has held the place of chief justice several times during his long service on the Supreme Bench. He is the dean of the State Supreme Court justices.

DEATH OF FEDERAL JUDGE IN ALABAMA.—Thomas G. Jones, 69 years old, United States judge for the Middle District of Alabama, died at Montgomery, Ala., on April 28. He had served as a Federal judge since 1902, having been appointed by President Roosevelt. He was a former Governor of Alabama and a veteran of the civil war.

ILLINOIS JUDGE DIES.—Judge Solon Philbrick, of the Illinois Appellate Court, Third District, died on April 21 at the age of 54. He graduated at the University of Illinois in 1884. In 1903 he was elected as circuit judge, and in 1907 he was a candidate to succeed Justice Jacob W. Wilkin of the Supreme Court, but was defeated by Frank Dunn of Charleston. In 1909 he was assigned to the appellate bench. He was regarded as one of the ablest jurists in the state.

ILLINOIS STATE BAR ASSOCIATION.—The annual meeting of the Illinois State Bar Association was held at Chicago, on May 27 and 28. Robert McMurdy, president of the association, delivered an address on the subject, "The Enforcement of Law." The report of the secretary and treasurer was made by John F. Voigt. Chief Justice John B. Winslow of Wisconsin delivered a special address on "The Enforcement of Law." Horace K. Tenney of Chicago made a report on "Change of Court Rules for Cook County." The Committee on Law Reform presented a proposed amendment of the Practice Act. The discussion on the report was led by William F. Bundy, chairman of the committee, and was followed by various members of the association. Henry Schofield presented the report of the special Committee on Non-Partisan Election of Judges, together with a proposed bill to carry out the report of the committee. Henry M. Bates, Dean of the Law School of the University of Michigan, Ann Arbor, Michigan, delivered a special address on "How the Law School Can Help in the Reform of Procedure." William Renwick Riddell, Justice of the Appellate Division, Supreme Court, Ontario, Canada, delivered an address on "The Enforcement of Law." The convention closed with a banquet on Thursday evening, May 28, at which the speakers were Mrs. Harlan W. Cooley, President Chicago Woman's Club; Henry M. Bates of Ann Arbor, Michigan; and William Renwick Riddell of Ontario, Canada.

JUDGE DILLON DEAD.—John Forrest Dillon, former judge of the Supreme Court of Iowa and of the United States Circuit Court for the Eighth Judicial District, counsel for the Goulds in the heyday of their railroad and telegraph power, member of the Greater New York Commission and for years a leader among the corporation lawyers of New York city, died at New York city on May 5. Judge Dillon was born in Northampton, N. Y., on Dec. 25, 1831. He went when a boy to Iowa, from whose State University he was graduated in 1850 as a doctor of medicine. He was admitted to the bar, however, in 1852, and in 1853 was married to Anna M. Price. Mrs. Dillon and her daughter, Mrs. Dillon-Oliver, lost their lives when La Bourgogne was sunk in 1898. After six years as prosecuting attorney, Mr. Dillon became in 1858 a district judge; in 1863 he went to the Supreme Court, and in 1869 to the United States Circuit Court. In 1879 he resigned, to spend three years as professor at Columbia University, and in 1882, forming a partnership with Gen. Wager Swayne, he resumed practice, with the Goulds as his principal clients. To membership in the third conference of the Association for the Codification of the Law of Nations and in L'Institut de Droit International, he added the authorship of a number of legal works, "United States Circuit Court Reports," "Municipal Corporations," "Municipal Bonds" and "Removal of Causes from State to Federal Courts" being among them. In

1891 he was elected President of the American Bar Association. The death of his wife and daughter was a heavy blow to Judge Dillon. He chartered a steamer and cruised out from Halifax for weeks in an effort to find the bodies of the women. He was seldom able to throw off the shadow of his bereavement.

MISSISSIPPI AND LOUISIANA BAR ASSOCIATIONS.—The joint meeting of the bar associations of Mississippi and Louisiana was held at Gulfport, Miss., on April 30 and May 1. Preliminary sessions were held by each of the two bodies. The Mississippi Association was welcomed by R. C. Cowan of the Gulfport bar, and the address of President Robert B. Mayes, of Jackson, was read by Vice-president Leftwich. The Louisiana Association was welcomed by George D. Dodds, president of the Harrison County Bar Association, and the annual address was delivered by President Benjamin Kernan. The Louisiana Association elected the following officers: Benjamin W. Kernan, president, re-elected; P. M. Milner, first vice president; G. W. Jack, of New Iberia, second vice president; C. A. McCoy, third vice president; Ed. Tweeks, fourth vice president; Chas. Duchamps, secretary, re-elected. The Mississippi Association elected officers as follows: Chief Justice Sidney Smith, of Tupelo, president; V. A. Griffith, of Gulfport, vice-president; H. B. Graves, of Canton, J. I. Robbins, of Tupelo, and J. M. Morgan, of Hathesburg, executive committee. The program for the joint meeting of the two associations was as follows: Address of welcome, Barney Eaton, Gulfport; response, Armand Romain, New Orleans; "The Legal Partition of Louisiana and Mississippi," W. K. Dart, New Orleans; "The Case of the Lost Million," James M. Beck, New York; "The Independence of the Judiciary Under Modern Conditions," Frederick N. Judson, St. Louis. The joint banquet was held on the evening of May 1. The address of welcome was delivered by G. J. Leftwich of Aberdeen, who also introduced Hon. Benjamin W. Kernan as toastmaster. Joe Hirsch responded to the toast, "Water, Water Everywhere," and George H. Terribery responded to "Louisiana." Other toasts were as follows: "Judges and Lawyers," Private John Allen; "The New Judge," J. S. Sexton; "The Distinguished Judge," Judge Percy Bell; "The Lawyers' Income Tax," James M. Beck of New York; "The Lawyers' Outgo Tax," Frederick N. Judson of St. Louis, and "The Manana Man," as viewed by Jack Lafience (James J. McLoughlin). Addresses were also made by Gov. Earl Brewer, Hon. B. P. Harrison, and others.

OTHER DEATHS.—In addition to the recent deaths heretofore mentioned in this column, the following may be noted: April 8, at Washington, D. C., Frank L. Campbell, aged 71, for many years assistant Attorney General for the Department of the Interior; April 15, at Chicago, Ill., George Mills Rogers, aged 60, former assistant United States district attorney and for twenty-five years a master in chancery in Chicago; April 17, at Bardwell, Ky., R. J. Bugg, aged 51, judge of the Kentucky Circuit Court; April 21, at Bedford, Ind., William H. Martin, aged 66, former judge of the Indiana Circuit Court; April 23, at Providence, R. I., General Thomas McManus, aged 80, formerly judge of the Connecticut Court of Common Pleas; April 27, at Philadelphia, Pa., George F. Baer, aged 72, lawyer and president of the Philadelphia and Reading Railway; April 27, at Ardmore, Okla., A. M. Funkhouser of Fort Smith, Ark., formerly on the district bench in Illinois; April 28, at Leon, Ia., Samuel Forrey, aged 88, formerly judge of the circuit court and district court of Iowa; April 29, at La Porte, Ind., William B. Biddle, aged 84, former circuit court judge of Indiana; April 30, at Bedford City, Va., J. Lawrence Campbell, judge of the Virginia Circuit Court; April 30, at Hastings, Minn., William Hodgson, aged 67, judge of the First Judicial District Court of Minnesota; May 1, at Paterson, N. J., Joseph W. Congdon, Associate Judge of the Court of Errors and Appeals of New Jersey; May 4, at Harrisburg, Pa., Lyman B. Gilbert, aged 68, former president of the Pennsylvania State Bar Association.

English Notes.

JUDICIAL CHANGES.—Several important changes have taken place recently in the Bench of the Supreme Court. Lord Justice Vaughan Williams and Mr. Justice Channell, after many years of strenuous and able service, have retired, the vacancies thus caused having been filled by the promotion of Mr. Justice Pickford and the elevation to the Bench of Mr. Montague Shearman, K. C., and Mr. John Sankey, K. C.

LAWYERS AS WAR MINISTERS.—The acceptance by Mr. Asquith of the great office of Secretary of State for War, to be held in conjunction with the position of Prime Minister and First Lord of the Treasury, will direct attention to the fact that for upwards of nine years since December, 1905, the position of Secretary of State for War has been held without interruption by members of the bar—Mr. (Viscount) Haldane, an eminent equity leader, who was transferred therefrom to the Lord Chancellorship, and was while War Minister appointed a Lord of Appeal and a member of the Judicial Committee of the Privy Council; his successor, Colonel Seely, who was called to the bar by the Inner Temple in 1897; and Mr. Asquith, who was bred to the bar, at which he attained eminence, and who once, when Prime Minister, in lamenting the death of Sir John Lawson Walton, K. C., in the office of Attorney-General, told the House that the late Attorney-General had been his contemporary and close personal friend, both at the bar and in the House of Commons, long before he contemplated a career not associated with the work and practice of the legal profession.

THE EARLIEST ENGLISH LEGAL PERIODICAL.—In an admirable bibliographical list issued by Messrs. Sweet and Maxwell, Limited, the earliest English legal periodical is stated to be the *Lawyer's Magazine*, which was published during the year 1761-1762. The only volume issued would seem to be rare, since the price of a copy is about five or six guineas. Apparently the only Inn of Court which posses a copy is the Middle Temple, and it is not recorded in such fine legal libraries as those of the Law Society, Faculty of Advocates, or Harvard University. The periodical was edited by a "Society of the Profession," and among the entertaining articles is "A Tract on the Unreasonableness of the Laws of England in Regard to Wives." The writer sets himself to prove "(1) That the condition of wives is more disadvantageous than slavery itself; (2) that wives may be made prisoners for life at the discretion of their domestic governors, whose power bears no manner of proportion to that degree of authority which is vested in any other set of men in England. . . .; (3) that wives have no property, either in their own persons, children, or fortunes." The magazine was primarily intended for students, but now has a wider interest, and, besides being somewhat of a bibliographical rarity, has some value to the student of legal history.

INTERNATIONAL CONGRESS OF POLICE.—There assembled at Monaco last week the first International Congress of Police, or,

to give it its full title, *Le Congrès de la Police Judiciaire*, says the *Law Times*. The congress, which was under the patronage of Prince Albert I. of Monaco, was presided over by Professor Larnaude, Dean of the Faculty of Law in the University of Paris. The agenda was limited to the four following subjects: (1) Unification of the law of extradition; (2) improvements in the methods of identification; (3) the establishment of a central international bureau; and (4) questions of police. A resolution was carried to the effect that the various societies of international law should devote themselves to the study of existing treaties of extradition, with the view to drafting a form of model treaty, and that the result of the labors of the societies should be communicated to the next congress. On the subject of provisional arrest, the congress expressed the view that the warrant to arrest a person, granted by the competent judicial authority, where the crime was committed, should always be viséd as a matter of form by magistrates in the country of refuge; and that, in cases of urgency, simple notice of the fact that a warrant had been issued transmitted by post, telegraph, or telephone should be sufficient for it to be acted upon, and that the arrest should be effected immediately, and that the examination of the accused should be begun at once.

SCHOOL TEACHER AS WITHIN WORKMEN'S COMPENSATION ACT.—Very great interest was attached to the workmen's compensation case decided in the House of Lords on April 6, namely, Kelly *v.* Board of Management of the Trim Joint District School. The case had been twice argued before their lordships, and on each occasion was two days at hearing. On the last occasion it was impossible to say in which direction the majority of the court was tending, though it was quite clear that one or two members had made up their minds on each side. John Kelly was a schoolmaster employed by the appellants, and while engaged in discharging his duties he was assaulted by the pupils in a concerted attack, and his injuries were so serious that he died in the evening of the same day. His mother as a dependent commenced proceedings before the County Court for compensation, and the question was, Did deceased meet his death by an accident arising out of and in the course of his employment? The County Court judge and the Court of Appeal (Lord Justice Cherry dissenting) answered this question in the affirmative. This judgment has been upheld by four to three of the Lords of Appeal, and the decision beyond doubt goes a step further than that which was marked by previous cases. It is now authoritatively decided that an accident is not the less an accident by reason of its being brought about by deliberate violence. There was not so much difficulty upon the question as to whether it arose out of and in the course of the employment of deceased as a schoolmaster, though the point was also strenuously put forward and argued.

BEQUEST OF A "BUSINESS."—Bequests and other dispositions of a "business" or "a share of a business" are of frequent occurrence, and, owing to the generality of the expressions used, it is often difficult to determine what passes thereby. It must be borne in mind that a business may consist of all or some of the following particulars—namely, goodwill, business premises, plant, stock-in-trade, capital, book debts, balance at the bank, and share of profits. In Re Henton, 30 W. R. 702, it was decided that a direction to transfer a business to a son at twenty-one did not include a freehold shop where the business was carried on. In Blake *v.* Shaw, 2 L. T. Rep. 84; Johns. 732, under a gift of "the plant and goodwill of my business in Aldersgate-street," it was held that the stock-in-trade and furniture in the house of business did not pass; but, it appearing that the house was held by the testator on a lease, of which a few years remained, at a rack rent, and exclusively for the purpose of the business, the testator's interest in the house passed under the bequest. In Delany *v.* Delany, 15 L. Rep. Ir. 55, a testator directed his executors to assign and transfer to H. "my said business and the goodwill thereof with the premises in which the same shall be carried on." It was held that the testator's capital in the business did not pass, nor did his book debts (which were regarded as part of capital), nor his stock-in-trade, but that sacks, horses and drays, forming, as it were, part of the implements of trade, did pass to H. As a matter of fact book debts, as a rule, would be partly capital and partly profits. In Re Barfield; Goodman *v.* Child, 84 L. T. Rep. 28, the facts were shortly as follows: A testator carried on business as a solicitor in partnership with C., who was the active partner. The capital was a fixed sum, the profits to be divided equally, after C. had taken £400 a year. Accounts were submitted annually to the partners, but were not signed by them. In these circumstances the testator by his will gave to C. all his share and interest in the business conditionally on his acting as solicitor to his estate free of charge. At his death moneys were standing to the credit of the testator's capital account, and there were undrawn profits. It was held that as goodwill in such a business was practically nonexistent, to include that only would be to give no effect to the gift, and that accordingly, having regard to the facts known to the testator, his intention was that the gift should pass both the share of capital and the undrawn profits. The case was distinguished from Re Beard, Simpson *v.* Beard, 58 L. T. Rep. 629, in which it was held that a gift of testator's share, right, and interest in a partnership did not pass a debt due to the testator from the partnership (and see Re Deller, W. N. 1888, p. 62). A case of the kind has recently come before Mr. Justice Astbury in Re Hawkins; Hawkins *v.* Argent, 109 L. T. Rep. 969. There a testator bequeathed his business in D. street to X. his brother and T. his manager, in equal parts, and the will proceeded: "I will that they pay Miss A. £10 per week during her life." It was held that the bequest included the lease of the house where the business was carried on, the balance at the bank, and the book debts. No doubt this construction was aided by the direction to pay the annuity, which was held to be payable out of the assets and not by the legatees personally. Having regard to the foregoing decisions, it behooves the draftsman and others, when drawing dispositions of a business, or an interest therein, to define carefully which of the various items that go to make up a business are intended to pass.

"It is a popular and flattering theory, that the only legitimate origin of government is in compact, and the exercise of individual will. That this is not practically true, is obvious from history; for, excepting the state of Massachusetts, and the United States, there is not perhaps on record an instance of a government purely originating in compact. And even here, probably, not more than one-third of those subjected to the government has a voice in the contract. Women and children under age arbitrarily assumed, are necessarily excluded from the right of assent, and yet arbitrarily subjected. If the moral government of our makers and our parents is to be deduced from gratuitous benefits bestowed on us, why may not the government that shielded our infancy claim from us a debt of gratitude to be repaid after manhood?" Johnson J., dissenting, Shanks *v.* Dupont, 3 Pet. 262.

Obiter Dicta.

THE BOSTON DISH.—Baker *v.* Bean, 74 Me. 17.

APPROPRIATELY STYLED.—Rich *v.* Milk, 20 Barb. (N. Y.) 616, was an action "to recover the value of the plaintiff's special property in five cows."

DIDN'T JOLLY HER ENOUGH.—The case of Jolly *v.* Jolly, 1 Iowa 9, was an action by a wife for a divorce on the ground of "the bad treatment of the husband."

MUST HAVE BEEN A CAT.—"On several occasions after the making of said agreement, and in February, 1875, she died intestate." See Sherman *v.* Scott, 2 N. Y. Civ. Pro. Rep. 367.

A LOST STOCKING.—From the facts set forth in Ex parte Hose, 34 Nev. 87, it seems that one Hose in Pennsylvania lost its mate and that the lost Hose was finally found in Nevada.

THE WAY THEY DO IT IN PENNSYLVANIA.—According to the title page of the set of Pennsylvania reports known as the "Weekly Notes of Cases," the cases therein reported were "argued and determined" by "members of the bar."

A TIGHTWAD.—The plaintiff in Baker *v.* Bailey, 103 Ark. 12, was held not to have been a guest at the defendant's hotel because, forsooth, "he spent nothing but the evening with the hotel, neither did he offer to spend anything else."

A CASUAL REMARK BY AN OLD FRIEND.—"It is neither necessary nor seemly that appellate courts should pretend to know less than the rest of mankind." Per Lamm, J., in State *v.* McQuillin, 246 Mo. 535.

EQUALLY TO BLAME?—The La Salle County (Ill.) *Daily Law Bulletin* of March 25, 1914, contains the information that the chancery case of Affronti *v.* Affronti was dismissed by the affronter with costs to the affrontee. Or was it the other way around?

NOT A LAUGHING MATTER.—Whatever may have been the natural temperament of the defendant in State *v.* Laughter, 159 N. Car. 488, there was nothing humorous about the decision of the Supreme Court which unanimously confirmed his conviction for the murder of his wife.

ANOTHER MATTER OF JUDICIAL KNOWLEDGE.—"It requires no great stretch of intelligence, and is certainly not beyond the capacity of the ordinary policeman of our municipalities, to recognize intoxicating liquor by the sense of taste." Per Lovely, J., in State *v.* Olson, 95 Minn. 105.

UNAVAILABLE EVIDENCE.—The defendant in Sprague *v.* Rooney, 104 Mo. 355, testified as follows: "Nobody except the plaintiff, myself and God Almighty were present when I signed the contract sued on, or at any time of the conversation between us respecting the property before the contract was signed." Needless to say, the impartial witness was not called.

A REVIVALISTIC PLEADING.—Says Judge Bleckley of the Georgia Supreme Court in Kupferman *v.* McGehee, 63 Ga. 260: "The demurrer signifies some objection to the prayer of the bill. There is, indeed, a profusion of prayer. Not only earnestly and devoutly does the complainant pray, but he prays comprehensively. He wants relief, and much of it. He seems to ask for everything that he can think of, and then to throw in a general petition to cover oversights. Over-zealous, perhaps, he hurries into some inconsistencies, and possibly no court can grant all he begs for. But a suitor is not to be turned out of court for his much praying. Here the bill was dismissed. The supplicant was condemned to perpetual silence."

TRIAL JUDGES AND THEIR CHARACTERISTICS.—If there is anything in a name, it must be pretty difficult to get a new trial before Judge Alfred Budge of the Fifth District Court of Idaho. Similarly, lawyers can try their cases with perfect confidence before Judge M. H. Justice of the Superior Court of North Carolina. By the same token, the outcome of litigation must be exceedingly doubtful when Judge A. E. Gamble of the Second Circuit of Alabama is on the bench. Dilatory motions probably find little favor with Judge James C. Work of the Orphans' Court of Fayette county, Penn. One of the best equipped men on the bench is Judge Ben. B. Law of the Ninth Judicial District of Montana. And finally, not to prolong the list unduly, we advise attorneys to keep quiet before Judge Orien S. Cross of the Michigan Circuit Court.

THE EXCEPTION TO THE RULE.—In Wilson Lumber, etc., Co. *v.* Hutton, etc., Co., 159 N. Car. 451, speaking to the point that every rule has its exception, Chief Justice Clark of the North Carolina Supreme Court thus entertains us, historically and poetically: "There is a maxim in war, 'Not to leave an armed fort in the rear without masking it or taking it.' At the battle of Germantown, 'Chew's House,' a stone building, was taken possession of by a small body of the enemy's infantry, perhaps half a company, when their army was in full retreat. One of the American generals insisted on applying the above maxim of war and halted our advancing line to take the 'fort.' The enemy rallied and the American cause lost a splendid victory and our independence was delayed several years thereby. To apply the above maxim of the land law, which is useful in appropriate cases, to the facts of this case with the most remarkable results which would follow, is to discredit the rule itself and will call for its abrogation altogether. . . . It is to be doubted if in all the books of the law there can be found a single case where an arbitrary rule as to the weight to be given one description in a deed, which was expressed by judicial decision and not by statute, as a matter of convenience and for the better ascertainment of the truth, is upheld as irrebuttable and admitting of no exception whatever, even when

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its application will be to contradict all of the other boundaries set out, and will increase the acreage fourteen-fold, and will reject entirely the plat which by statute is laid down on the grant. In its proper place and in proper cases, the rule is useful. To apply it here will be mischievous. Even in 'the laws of the Medes and Persians' an exception was found, as there is to all rules. But the defendant contends that none shall be permitted to this, however palpably, even painfully, erroneous and wrong the result it shall bring about. If so, then this of itself is an exception to the general rule that "All rules have their exceptions,' for *exceptio probat regulam.* It was of such as this that Tennyson spoke:

"The old order changeth, yielding place to new,
Lest one good custom should corrupt the world."

As the old Latin maxim has it, *Quis hæret in litera, hæret in cortice."*

ANENT CIRCUMSTANTIAL EVIDENCE.—"The chain theory is largely responsible for the misconception and consequent prejudice which exists in the minds of so many persons against circumstantial evidence. When we start out with false premises, we are sure to arrive at an unsound conclusion. It may be stated as an axiom that truth is never derived from or will seek companionship with error. It is therefore of the utmost importance that we base our conclusions not only on sound reasoning, but also upon true premises. Instances have been industriously collected in which persons have been wrongfully convicted upon circumstantial evidence which are invariably used for the purpose of intimidating courts and juries and preventing them from enforcing the law upon this class of testimony. But a fair investigation will show that these instances are rare when compared with the great volume of business transacted, and that they have occurred at times and places remote from each other. An investigation will show that a much larger per cent. of persons have been convicted improperly upon direct and positive evidence. The Saviour of mankind was crucified upon direct and false testimony. In the first and second verses, twenty-third chapter of St. Luke, we find the following:

'1. And the whole multitude of them arose and led him unto Pilate.

'2. And they began to accuse him, saying, We found this fellow perverting the nation, and forbidding to give tribute to Cæsar.'

"Here was direct and positive testimony which Pilate himself did not believe, but upon which he acted on account of the clamor of the rabble. Stephen, the first martyr in behalf of Christianity after the crucifixion of Christ, was convicted and executed upon direct and perjured testimony. In the sixth chapter of Acts, tenth, eleventh, twelfth, and thirteenth verses, we have a statement of the testimony upon which he was condemned. It is as follows:

'10. And they were not able to resist the wisdom and the spirit by which he spake.

'11. Then they suborned men, which said, We have heard him speak blasphemous words against Moses, and against God.

'12. And they stirred up the people, and the elders, and the scribes, and came upon him, and caught him, and brought him to the council.

'13. And set up false witnesses, which said, This man ceaseth not to speak blasphemous words against this holy place, and the law.'

"If we are going to reject circumstantial evidence because at some remote time and in distant localities some few persons may have been unjustly convicted thereon, we should be consistent, and we must also reject all testimony, because a great many more persons have been unjustly convicted on direct testimony than have ever been convicted on circumstantial testimony." Per Furman, P. J., in Ex parte Jefferies, 7 Okla. Crim. 551.

PATENTS

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WATSON E. COLEMAN,

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BLOODHOUND EVIDENCE.

To the Editor of LAW NOTES.

SIR: In your last issue you gave to your readers a most excellent article under the above caption. I enjoyed reading it very much indeed. This kind of evidence is now being so much resorted to and our Mississippi Supreme Court has now so definitely settled the matter in this state that I deemed it possible that a short article on that subject from this section might not be amiss—and the more especially so since in your able article just referred to no reference was made to the Mississippi decisions.

In Spears *v.* State, 92 Miss. page 613, our court, speaking through Whitfield, C. J., lays down the following rules with reference to the admissibility of bloodhound evidence, to wit: (*a*) That the dogs must be shown to have good pedigrees and be of pure blood; (*b*) that they had previously been well trained to track human beings; (*c*) that the owner or handler of the dogs was shown to be an experienced dog trainer; (*d*) that they had been subjected to severe and satisfactory tests in the tracking of persons; (*e*) that they had been put upon the trail at the place where it was shown the criminal agency must have had its origin.

Very recently this court, speaking through Reed, J., has gone still further and holds that bloodhound evidence alone is insufficient to warrant a conviction. This opinion is found in Vol. 64 So. Rep. page 215 and in part reads as follows: "Shall a person charged with crime be convicted upon the fact, alone and unsupported, that trained bloodhounds trailed from the scene of the crime to him? Such evidence may be deemed a circumstance to be considered, in connection with other proof, in determining the guilt or innocence of the accused. State *v.* Adams 85 Kan. 435; 116 Pac. 608; 35 L. R. A. (N. S.) 870; State *v.* Freeman 146 N. C. 615 and 60 S. E. 986. Alone and unsupported such evidence is insufficient to sustain a conviction; there must be other and human testimony to convict. Reversed and appellant discharged."

Holly Springs, Miss.

W. A. BELK.

"There is a great deal of confusion in the use of the word 'sovereignty' by law writers. Sovereignty or supreme power is in this country vested in the people, and only in the people." Field, J., dissenting. Fong Yue Ting *v.* U. S., 149 U. S. 757.

Law Notes

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Relief for the Straphanger.

UNDER a recent decision of the New Jersey Supreme Court a passenger upon a public conveyance need not pay fare unless provided with a seat. This is the gist of an opinion handed down by Justice Swayze, setting aside the conviction of one found guilty of disorderly conduct by a lower court because he refused to pay fare on a crowded trolley car in which he was compelled to stand. The company, it appears, had failed to show that the man had violated the trespass law or that he had entered the car without the expectation of paying his fare. This decision will be of interest to a multitude of the denizens of our large cities who are forced to augment the weariness of a busy day by hanging to a trolley strap on their way home. They may, of course, be ready to subscribe to the Darwinian theory, but there must be many a smothered imprecation over being compelled to give such tangible evidence of their simian ancestry.

Militancy on the Bench.

As the judge of one of our Western courts was leaving the bench, after making a decision in a case, the losing attorney remarked with some heat that he was hopeless of getting "a square deal" in that court. And what did the judge do—reconvene court and mulct the attorney in a heavy fine for the flagrant contempt? He did not. He came back at the attorney in good, strong Anglo-Saxon and prepared to thrash him if the insult was repeated. Involuntarily we are impelled to say, Good for the judge, who thus waives the easy advantage of judicial power and as man to man submits his honor to the chivalric wager of battle! How much more admirable this than the case of the justice of the peace who on being taken to task on the street by a man against whom he had decided a case, said, "Be careful, sir, or I'll adjudge you in contempt of court." "You can't do that, you're off the bench," retorted the man. "I want you to understand," said the justice, drawing himself up to his full height, "that wherever I am, I am an object of contempt."

Should Young Lawyers Go West?

THE secretary of the Harvard Law School, adapting Horace Greeley's famous admonition, advises young lawyers to go West. He says that the income of the youthful member of the bar is less in the New England States than in any other part of the country, and that the most desirable field and the biggest fees are in the West. With a surprising nicety of calculation he fixes the average earnings of a lawyer in his first year of practice at $664. The West does doubtless offer a better field for the practice of the law than the East. Land titles are not so well settled in the West, and by reason of the more or less shifting character of the population it is easier for the young lawyer to "break in." But the elusive hope should not be held out to the embryonic Blackstone that in the West, or any other section of the country for that matter, the pathway of his legal novitiate will be other than a rough and thorny one. As to the average first-year earnings we should say that if the young lawyer is but square with his landlord—not to speak of his landlady—at the end of his first year of practice his case will not be exceptional. "Do not be greatly surprised," said the dean of a certain law school to his undergraduates, "if in the first years of your practice you do not find the big cases gravitating to you." The thing, in fact, that should be most strongly impressed upon the law student is that the law, unmixed with business ventures, is not a particularly lucrative profession, and that the assiduous practice of it can lead to but a comfortable competence. Leaving out of consideration the few exceptional cases in the large centres, it is as true to-day as it was in the earlier days of the profession that the ineluctable fate of the lawyer is to "work hard, live well, and die poor."

Lack of Equality in Criminal Sentences.

A MINNESOTA judge has sentenced to forty years' imprisonment—practically a life sentence—a boy twenty years old, who, out of work and hungry, was charged with holding up and robbing a man of $1.85 and an overcoat. The judge says the boy pleaded guilty to first degree robbery and there was nothing for him to do but impose the sentence he did. But should he have permitted the youth to plead guilty to first degree robbery if he was bound to impose such a severe sentence? Judges are on the bench to protect the interests of the accused as well as those of the state. In this case the state appears to have been over-zealously served, and the interests of the youthful defendant sadly neglected. The case is but another illustration of the inequity that results from a system under which the sentencing of criminals devolves upon a single judge. With such a system equality before the law is more or less of an iridescent dream, for under it there can be no uniformity in prison sentences. It frequently happens that where two persons are convicted of the same crime and are sentenced by different judges, one will be given, for example, a five year term

and the other a ten year term, with nothing in the latter's case to warrant the disproportionate sentence. In short, the character of the sentence in a particular case depends much upon the temper or idiocrasy of the sentencing judge. Here lies one of the many crudities in our penal system, which appears to call for the attention of the penologist.

Municipal Psychopathic Laboratory.

THE city of Chicago has lately installed as an adjunct to its Municipal Court a psychopathic bureau, which will be in charge of skilled men and women who, both at a glance and with minute scientific tests, can determine the underlying constructive and contributing faults in defectives and defectiveness, and so advise the court that is passing on the subject's future. The aim of the investigators will be to lay before the court the full physical and mental history of the man, woman or child on trial, in order that justice may be meted out with due regard to nature's demands and shortcomings. "You can imagine the handicap a judge works under," declared Chief Justice Olson of the Municipal Court, who has been interested in the establishment of the bureau, "when a defective appears for sentence. With the simple tests of intelligence and physical tests no more involved than fitting twelve blocks into their proper places in a board, or the gripping of a handle, or the bending of an arm, results are obtained. Attorneys or the family may not have brought out moral and physical conditions surrounding the culprit, that are just as plainly apparent to one versed in that science as finger prints are legible to experts. Can you imagine sending men and women to the Bridewell who ought to be in the insane asylum, or hanging a boy who has always been defective and whose parents were insane before him?"

Dr. W. J. Hickson, former medical director at the Training School, Vineland, N. J., where the work was first taken up extensively in the United States, who is to be at the head of the new bureau, has this to say about the work: "The East looks to the West—and particularly Chicago—for demonstrations of advancement in justice and humanitarian work. Your Morals Court and Court of Domestic Relations blazed the way for other cities. From Germany we now are to adapt this latest step, the psychopathic bureau. We are not phrenologists, or bone feelers. We are not experimenting. We are to advise the court of the normal and abnormal qualities in the special cases before the court, and in that manner aid the administration of justice and the formation of natural corrective methods."

The Chicago innovation appears to be in line with the views of advanced criminologists. It is easily demonstrable that much of the so-called crime is due to the physical and mental defects of the "criminal." A brain lesion has often been responsible for deeds of sudden violence which the surgeon's knife would have prevented, and medical treatment has reclaimed to normality many a victim of uncontrollable criminal tendencies. When we abandon the medieval compensatory idea of punishment and adopt effective curative and reformatory agencies in our treatment of criminals we shall have fewer of them and correspondingly less use for the expensive agencies that we multiply to protect ourselves from them.

Right of Aviation over Private Property.

THE old common-law maxim *cujus est solum ejus est usque ad coelum* has received another judicial jolt in the recent decision of a Paris court that the owner of land has no such proprietary ownership of the air above it that he is legally entitled to prevent an aviator from flying over it. This decision not only accords with common sense but, in view of the modern developments of aviation, appears to be compelled *ex necessitate*. We have seen no other decision directly in point upon the question, but the language of a recent text writer is in line with the ruling of the Paris court. Mr. Berkeley Davids (The Law of Motor Vehicles, §290), in discussing the right of aviators to pass over private property, says: "Assuming that by the rules of our system of jurisprudence a landowner is possessed of the fee in the space superjacent to his land, and may appropriate as much as he can of it, the next inquiry is whether the owner is entitled to compensation for the privilege of using his space for the passage of aerovehicles. Is an invasion of such space a trespass for which the landowner may recover damages? This question is answered in the negative by both reason and the authority that is deducible. The air domain of a proprietor may be utilized by him to any extent, but in so far as he has not appropriated it, it must be deemed to be subject to a servitude of passage by aviators. The case is analogous to that of the highway upon which the public have a right of passage, while the fee remains in the owner of the abutting land. Trespass or any other foundation of legal liability proceeds upon an assumption that an injury has been done. To set foot upon another's land without his license to do so is a trespass, although the damage amounts to practically nothing; yet there is some damage —the soil is trodden down or the grass bruised. The momentary occupation of space above land, suspended upon air which is itself as fugitive as the aeronaut, is quite another matter. The absence of injury is the practical consideration, and should outweigh any others in determining what the rule of law shall be. . . . The air space is analogous to a navigable stream which runs through a man's land. Nor is the owner of the fee in the space that may be used for passage entitled to compensation as for a taking of his property; because he has been deprived of nothing whatever. There is not even an injury to which may be applied the rule *de minimis non curat lex.*"

The right of an aviator, however, to pass over another's land is not an unqualified right. It is primarily a right of passage only, and it must be exercised so as not to cause a nuisance to the subjacent proprietor. "The moment an aviator ceases to be a passerby he risks becoming a wrongdoer," says the author from whom we have quoted (§291). "He may occupy another's space temporarily, but he must not do so longer than is reasonably necessary for passage. The presence of aerovehicles above the land is more or less of a menace to life, buildings, crops, etc. The law recognizes the risk and concedes the right of passage nevertheless; but it does not permit any increase in the risk by reason of a stoppage, hovering, or the like. Such acts amount to a nuisance per se. . . . The height at which an aviator may lawfully pass over private property must vary according to the circumstances of the case. The criterion is the degree of peril or inconvenience to which the proprietor is subjected. Passing in

close proximity to an ordinary city dwelling can cause little or no more inconvenience than does a motor vehicle or street car moving along the street. But passing over a man's lawn in the country, where he has sought seclusion and whereon his children are playing, is another matter. Again, flying so low as to cause fright to domestic animals doubtless renders the aviator liable for whatever damage may result."

More about "One-judge" Decisions.

IN LAW NOTES for June the subject of "one-judge decisions" was discussed, attention being called to a recent reform which has been accomplished in Alabama, by which every case submitted to the Supreme Court will be decided by the court before it is referred to a justice for the preparation of an opinion. Our attention has just been called to a movement which is actively on foot in Louisiana for the abolition of the "one-judge" system of deciding cases in the Supreme Court of that state. A constitutional amendment prepared by the Louisiana Bar Association has been introduced in the Louisiana legislature by which the membership of the court is to be increased to seven and the court as thus constituted is to be divided into two sections, each section to be composed of three associate justices and the chief justice. The cases are to be allotted equally to the two sections, and the sections are to sit alternately each alternate week of the term. The danger of a divergent jurisprudence resulting from the division of the court into two sections has been reduced to a negligible minimum by the provision that the court shall arrange the composition of each section so that the same three associate justices shall, as far as possible, never sit together as a section of the court more than one week during the session, except to hear unfinished cases; and by the further provision that the chief justice shall sit with and preside over both sections. We quote in part from the argument made by the Louisiana Bar Association Committee before the joint judiciary committees of the legislature in behalf of the proposed constitutional amendment:

"The purpose of the amendment is to effect a change in the system under which the decisions of the Supreme Court of the State are presently reached. That system is the so-called 'one-judge' system, under which a case when argued and submitted is allotted for decision to a single justice who studies the case, reaches a decision, prepares an opinion and then submits this opinion at a consultation to the other justices, no one of whom has read either the record or the briefs in the case, or given the case any consideration since the argument which may have occurred weeks, or even months, before. For obvious reasons it is clear that the decisions reached under this system are, in the great majority of cases, decisions by the one justice who has studied the case and prepared the opinion, and in no just sense decisions of the court. That this is a vicious system is generally, if not universally, admitted. The excuse for it, and that it is a valid excuse is conceded, is that in view of the volume of business and of the present constitution of the court no other system is practicable. To make practicable a change of system under which the decisions of the Supreme Court shall cease to be decisions by a single justice, it is clear that there must be effected a reduction of the number of cases in the decision of which each justice shall be called upon to participate and an increase of the working time available to each justice, that is to say, of the time when he is off the bench. Both of these results are effected by the proposed amendment. The membership of the court is to be increased to seven; the court as thus constituted is to be divided into two sections, each section to be composed of three associate justices and the chief justice; the cases are to be allotted equally to the two sections; and the sections are to sit alternately each alternate week of the term. Under this amendment, therefore, it is clear: (1) That leaving out of view for the moment the exceptional cases in which the court will sit en banc, each associate justice will be called upon to participate in exactly one-half of the number of cases in which he is called upon to participate now. (2) That whereas each associate justice now sits on the bench for the purpose of hearing arguments for twenty weeks out of forty, which constitute the term, he will sit under the proposed amendment for only ten weeks out of the forty. In other words, each associate justice will, under the proposed amendment, have thirty, instead of twenty, off weeks during each term. Under these circumstances it is believed that from the point of view of the associate justices the system of reaching decisions by the sections prescribed in the amendment, i. e., that the decision shall be reached after consultation at which the chief justice shall be present, and that thereupon the chief justice shall assign an associate to write the opinion, or write it himself, will be entirely practicable. It is true that the amendment contemplates that each associate justice shall, for the purposes of the consultation at which the decisions of the cases allotted to each section shall be reached, make a sufficient study of the briefs and the record in each case, or in the aggregate, in one-half of the total number of cases submitted for decision to the court, whereas under the present system each justice examines the record and briefs only in the cases assigned to him for decision, being one-fifth of the total number of cases submitted to the court for decision. In this connection, however, the following considerations are to be borne in mind: (a) That each associate justice will have fifty per cent. more working time at his disposal than he has under the present system. (b) That as conceded and explained by Mr. Justice Provosty at the hearing, the work upon each case involved in preparation for the consultation at which the decision will be reached will be very much less than that involved in the decision of the cases assigned to each justice under the present system, and in the preparation of the opinions therein, when the whole responsibility is in effect thrown on the single justice. (c) That in the great majority of cases after the decision shall have been reached at the consultation the preparation of the opinion will be a comparatively simple matter. (d) That whereas the disposition of applications for rehearing constitutes under the present system a very material part of the work of the court for the reason, in the first place, that in view of the understanding of the Bar that the decisions are in effect 'one-judge' decisions, applications for rehearing are made quite as a matter of course in almost every case, and, in the second place, that the application goes to a judge who is entirely unfamiliar with the case, it is believed that the labor involved in the disposition of applications for rehearing will, under the proposed system, be materially reduced, in the first place, because under that system there will be fewer applications, and, in the second place, because, in

view of the familiarity with the case of each judge of the section to whom the application is made, the labor involved in the consideration of the application will be reduced to a minimum. In view of the foregoing considerations, it is confidently believed that under the proposed system the business of the court can be dispatched with reasonable expedition without involving on the part of any associate justice more hours of work than he gives under the present system."

WOMEN LAWYERS AND JUDGES.

THE English suffragettes will doubtless find a new grievance in the recent affirmance by the Court of Appeal of the doctrine that women cannot practice law in the courts of England. The Master of the Rolls in dismissing the appeal in a suit brought by a woman against the Law Society, in which she claimed the right to practice as a solicitor, bases his judgment, not upon the ground that there is any inherent unfitness among women which prevents them from appearing as practitioners in courts of law, but upon the ground that there never has, in fact, been a woman lawyer in England. (See 2 Ruling Case Law 945.) More than three hundred years ago Lord Coke expressed the view that women could not be attorneys. This disability existed at the date of the passage of the solicitor's act in 1843, and that act, the Master of the Rolls held, had not destroyed the pre-existing disability. No doubt, he said, many women, and in particular the applicant in the instant case, were in education, intelligence and competency superior to many candidates who would come up for examination. But with that the court had nothing to do. It had no right to legislate in the matter. As a result of the decision of the Court of Appeal a bill has been introduced in the House of Commons which aims at giving English women the right to practice as lawyers. It appears to be a question, however, whether the bill will receive the support of the government, without which it stands little chance of success.

In the United States women have generally been admitted to practice law, either under special legislation providing therefor, or by a liberal interpretation of existing statutes relating to admission to the bar. There have been a few notable exceptions, however. The Supreme Court of Illinois, in an opinion delivered in September, 1869, upon the application of Mrs. Myra Bradwell, held that the admission of women to the practice of the law was without precedent, unknown to the common law, and not within the thought and intention of the legislature at the time the statute providing for the admission of attorneys to practice was enacted. *In re Bradwell,* 55 Ill. 535. Mrs. Bradwell took the matter to the Supreme Court of the United States, and that court held that the decision of the state court violated no provision of the Federal Constitution. *Bradwell* v. *State,* 16 Wall. 130. Another decision adverse to the admission of women to practice law is that in the case of Mrs. Belva Lockwood, who was refused admission to the Court of Claims, Washington, D. C., in 1874, solely on the ground of her disabilities as a married woman. See Ch. Leg. News, May 23, 1874. At the August term, 1875, of the Supreme Court of Wisconsin, Miss Lavinia Goodell was denied admission to the bar of that court in consequence of her sex. *In re Goodell,* 39 Wis. 232. The opinion in this case was delivered by Chief Justice Ryan, and there is something fine in the way that great jurist adheres to the old landmarks set between the spheres of the two sexes. In the course of his opinion the chief justice, after considering certain statutory provisions, says: "So we find no statutory authority for the admission of females to the bar of any court of this state. And, with all the respect and sympathy for this lady which all men owe to all good women, we cannot regret that we do not. We cannot but think the common law wise in excluding women from the profession of the law. The profession enters largely into the well being of society; and, to be honorably filled and safely to society, exacts the devotion of life. The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex. These may need employment, and should be welcome to any not derogatory to their sex and its proprieties, or inconsistent with the good order of society. But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours. There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things. And it is not the saints of the world who chiefly give employment to our profession. It has essentially and habitually to do with all that is selfish and malicious, knavish and criminal, coarse and brutal, repulsive and obscene, in human life. It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, divorce: all the nameless catalogue of indecencies, *la chronique scandaleuse* of all the vices and all the infirmities of all society, with which the profession has to deal, and which go towards filling judicial reports which must be read for accurate knowledge of the law. This is bad enough for men. We hold in too high reverence the sex without which, as is truly and beautifully written, *le commencement de la vie est sans secours, le milieu sans plaisir, et le fin sans consolation,* voluntarily to commit it to such studies and such

occupations. *Non tali auxilio nec defensoribus istis,* should juridical contests be upheld. Reverence for all womanhood would suffer in the public spectacle of woman so instructed and so engaged."

Chief Justice Ryan in the Goodell case, *supra,* sought to reduce the argument on behalf of the applicant to an *ad absurdum* by showing that if the permissive rule of statutory construction by which words of the masculine gender are applied to females were to be applied to a provision applicable in terms to males only and should be given effect, without other sign of legislative intent, to admit females to the bar, the same peremptory rule of construction would reach all or nearly all the functions of the state government, would obliterate almost all distinction of sex in the statutory *corpus juris,* and make females eligible to almost all offices under the statutes, municipal and state, executive, legislative and judicial, except so far as the constitution might interpose a virile qualification. The logical leadings of the applicant's argument do not appear as absurd today as they must have appeared at the time the Goodell case was decided. Women today are pushing themselves into almost every branch of the public service. They are running for Congress in Colorado, and are on the police force in Chicago. In Massachusetts a legislative bill was recently filed at the request of the Massachusetts Association of Women Lawyers which would make women eligible to appointment as judges in all the courts created by the statutes of that commonwealth.

The appointment or election of women judges to courts of general jurisdiction might not be wise. But women would be well qualified to preside over juvenile courts. They certainly could deal more sympathetically and understandingly with the juvenile waifs and strays of the feminine sex than a man could. The experiment, therefore, which is now being tried at St. Louis appears to have everything to commend it. The circuit court judge presiding in the juvenile court in that city has vested two women, who are assistant probation officers, with practically plenary powers in all cases involving delinquent girls of tender ages. The women will sit in special private sessions hearing evidence of witnesses and will have power to hand down final decisions in all cases where they agree as to the disposition of the delinquent. The juvenile court judge has declared that only in cases where they fail to agree or where an appeal is asked from their rulings, will he attempt to interfere with their decisions or fail to approve their recommendations. Mrs. E. C. Runge, one of the judicial appointees, in giving a general outline of the proposed work of the new court, says: "All girls up to the age of seventeen, who otherwise would come before the man judge sitting in the Juvenile Court, now will be sent direct to us. We had one case this morning of a girl whom Judge Hennings did not see at all. She was sent before us, and we heard the evidence and continued her case for further investigation. This will be done by another probation assistant, who will go to the homes of the girls or to their places of employment and investigate their environments. She also will see the accusing witnesses and get their side of the story. Her report to the probation officer will be laid before us for evidence in each case thus investigated. We have full authority to dispose of all girl cases. We can send girls to the House of Detention if we determine that such a course is necessary. But our efforts will be directed to keeping the girl in her home and re-establishing her, if possible. The object of this branch of the Juvenile Court will be to reform or aid, not to punish."

SUBJECTING THE HOMESTEAD, OTHERWISE EXEMPT, TO SALE IN SATISFACTION OF MECHANICS' AND MATERIALMEN'S LIENS.

THE setting aside of a "homestead" for the use of the head of a family has been recognized for a long time as one of the necessities for the preservation and protection of the home. The welfare of the community is dependent upon the welfare of the individuals composing it, and the state has found that it can promote the welfare of its citizens to a large degree by permitting, and often directing in its constitution, the protection of a certain amount of property used as a home, that the family might be protected against the improvidence of the head of the family, as well as against the avarice of the creditor. There is no end to expressions of that idea in the reported cases, and it would be an idle waste of time to attempt a collection of the cases so holding. The manner in which the several states have protected the homestead varies from a constitutional provision defining the homestead, and its exact limits, to merely a legislative enactment resting upon no constitutional provision, but enacted under the general power and policy of the state to protect its citizens. With respect to the constitutional provisions relative to the homestead, the states of the Union may be divided into five classes, as follows:

I.

Where the constitution directs the legislature to pass "liberal" homestead and exemption laws. In the constitution of Colorado, Article XVIII, Section 1, it is provided:

"The General Assembly shall pass liberal homestead and exemption laws."

Similar provisions are found in the constitutions of Illinois (Article IV, Section 32), Mississippi (Article XII, Section 24), and Montana (Article XIX, Section 4). Under such a constitutional provision, the power of the legislature to provide for a homestead which shall be generally exempt, and yet subject to sale for the satisfaction of mechanics' and materialmen's liens, cannot be doubted, for such a provision vests in the legislature a discretion in determining what constitutes liberal or proper exemption or homestead laws.

II.

Where the constitution expressly says that the homestead shall be subject to sale on laborers', mechanics' and materialmen's liens, or for obligations incurred in making improvements on the homestead, or where the constitutions contain a specific provision that laborers, mechanics, artisans and materialmen shall have a lien upon the property upon which they have bestowed labor or furnished material. The constitution of Florida, Article X, Section 1, for instance, provides:

"A homestead, to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing within this State, together with one thousand dollars worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. *But no property shall be exempt from sale* for taxes or assessments, or *for the payment of obligations contracted* for the purchase of said property or *for the erection or repair of improvements on the real estate exempted,* or for house, field or other labor performed on the same. This exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner; and no judgment or decree or execution shall be a lien upon exempted property except as provided in this article.'

Though varying in some cases as to some details, yet with principle the same, similar provisions are found in the constitutions of Georgia (Article IX, Section 2), Kansas (Article 15, Section 9), Louisiana (Articles 219 and 220), Minnesota (Article I, Section 12, as amended November 6, 1888), Nevada (Article IV, Section 30), South Carolina (Article III, Section 28), Tennessee (Article XI, Section 11), Texas (Article XVI, Section 50, Constitution of 1876), West Virginia (Article VI, Section 48), and Wyoming (Article XIX, Section 1). Oklahoma (Article XII, Sections 1, 2 and 3) has a similar provision, but provides further:

"The legislature may change or amend the terms of this article."

The provisions contained in the constitution of California are different in form, but accomplish the same purpose as the provision contained in the constitutions of the other states of this group. Article XVII of California's constitution provides as follows:

"The legislature shall protect from forced sale a certain portion of the homestead and other property of all heads of families."

And in Article XX, Section 15, it is provided:

"Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the legislature shall provide by law for the speedy and efficient enforcement of such liens."

In the face of the express constitutional provision, the power of the legislature to subject the homestead to forced sale for the satisfaction of mechanics' and materialmen's liens cannot be denied. In fact, there is good ground for saying that any act of the legislature seeking to exempt the homestead from sale in such cases would contravene the constitution, and consequently be null and void.

Wilder v. *Frederick,* 67 Ga. 669, is an interesting case arising from this group of states, for in that case it is held that to subject the homestead to sale for labor and materials, such labor must have been rendered, and such materials furnished for the improvement of the property *after it had been set apart as a homestead, otherwise the exemption would prevail, if claimed.*

III.

Where the constitution expressly excepts from the exemption of the homestead, whether fixed by the constitution or the statute, laborers' and mechanics' liens for labor alone. The provisions of the constitution of North Carolina, Article X, Sections 2, 3 and 4, may be cited as illustrative of this group, which are as follows:

"Sec. 2. Every homestead, and the dwelling and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or, in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwellings or buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempted from sale under execution, or other final process, obtained on any debt. But no property shall be exempt from sale for taxes, or for payment for obligations contracted for the purchase of said premises.

"Sec. 3. The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt, during the minority of his children or any one of them.

"Sec. 4. *The provisions of sections one and two of this article shall not be so construed as to prevent* a laborer's lien for work done and performed for the person claiming such exemption or *a mechanic's lien for work done on the premises.*"

Similar provisions are found in the constitutions of Alabama (Article X, Sections 2, 3 and 4), Arkansas (Article IX, Section 3), and Virginia (Article XIV, Section 190). Under such a constitutional provision it has been held that the legislature might subject the homestead to sale for labor done on the premises, but not for material furnished. The most interesting and instructive case arising in the states of this group is that of *Cumming* v. *Bloodworth,* 87 N. C. 83. In that case the plaintiff had furnished lumber to construct the defendant's dwelling-house, and pursuant to an act of the legislature a lien was claimed on the premises. Foreclosure was had, and at the time of the levy, the defendant demanded that the sheriff lay off a homestead. In passing upon the question as to the power of the legislature to subject the homestead to sale on a lien for materials, the Supreme Court said:

"We are therefore unable to perceive how it can be contended that the lien for materials furnished, given by an act of the legislature, can constitute a lien upon the land covered by the homestead when no such lien is anywhere mentioned in the constitution.

"If it had been the intention of the framers of that instrument to make the lien for material furnished an exception to the general exemption of the homestead from execution, etc., they would have declared so in language as explicit as that used in reference to the exceptions mentioned; but as they did not do so, the conclusion is that they did not intend to allow any other exceptions than those expressly designated. *Expressio unius exclusio alterius.*

"And the homestead being a right created and vested by the constitution, with the exceptions to its exemptions defined and enumerated in the same, it is not in the power of the legislature to impair or abridge its efficacy for the purpose of its creation by adding other exceptions. To hold that the legislature can exercise such power, would be conceding to it the right to override the constitution and frustrate the intentions of its framers.

"We think it is too plain to admit of controversy that the act of 1869-'70, so far as it may have intended to give a lien

for materials furnished upon land set apart and allotted as a homestead, is in violation of the constitution, and we therefore hold that the charge of His Honor to the jury was erroneous, and that his judgment be reversed."

So it would seem that where the constitution fixed the homestead, or directed the legislature to fix it, exempt from sale except in certain cases, it is beyond the power of the legislature to provide for the sale under execution in other cases not mentioned in the constitution.

IV.

Where the constitution contains no provision regarding the homestead, and the homestead exemption, if any exists, is wholly the creature of statute. Included in this group are the following states: Arizona, Connecticut, Delaware, Idaho, Iowa, Kentucky, Maine, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island and Vermont. From these states, since there are no constitutional provisions, there are no decisions touching upon the constitutionality of any enactment of the legislature concerning the homestead, and it is within the unquestioned power of the legislature in those states to subject the homestead to sale in the case of laborers' and materialmen's liens, and exempt it generally from other liabilities.

V.

Where the constitution protects generally from forced sale a homestead, or provides generally for exemptions, whether the homestead or exemptions be created and defined by the constitution itself, or whether the extent of the homestead or exemption be fixed by the legislature pursuant to the mandate of the constitution. In this class are found the states of Indiana, Maryland, Michigan, Minnesota prior to 1888, South Dakota, Texas prior to 1868, Utah, Washington and Wisconsin. The provision of the constitution of Minnesota prior to the adoption of the amendment hereinbefore referred to, being Article I, Section 12, was as follows:

"No person shall be imprisoned for debt in this state, but this shall not prevent the legislature from providing for imprisonment or holding to bail persons charged with fraud in contracting said debt. *A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law.*"

The Minnesota legislature, March 12, 1858, passed "An Act for a Homestead Exemption," Section 9 of which excepted from the exemption provided debts for wages due clerks, laborers and mechanics. The Supreme Court in holding such exceptions unconstitutional, in the case of *Tuttle* v. *Strout,* 7 Minn. 465 (7 Gil. 374), 82 Am. Dec. 108, said:

"In regard to the question raised by the plaintiff, we cannot resist the conclusion that the ninth section of the act conflicts with section 12 of the bill of rights. The language of the constitution is too plain to admit of serious doubt, either as to its interpretation or application to the act under consideration. 'A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability.' This includes debts or liabilities of every kind or description, without exception; and it certainly requires no argument to show that a sum of money due for services rendered by a clerk, laborer or mechanic, is a debt or liability. The constitution makes no exception in favor of any particular class of persons, or kinds of debts or liabilities; nor should we recognize the right of the legislature to make any such distinctions. If one class of persons, or kind of debts or liabilities, may be excepted, all may be, and the constitutional provision might thus be rendered entirely nugatory."

In 1869, the Minnesota legislature amended the homestead act by providing that "such exemption shall not extend to any contract for a lien, or upon which a lien would arise under the lien laws of this state for work done or material furnished in the erection or repair of a dwelling-house, or other building, on said lands." In the case of *Coleman* v. *Ballandi,* 22 Minn. 144, the court was called upon to construe this amendment, and in doing so, said:

"Assuming, however, that the legislature intended, by this amendment, specifically to give to a materialman, in the absence of any agreement, the right to secure and enforce his lien upon his debtor's homestead, and that the section, as amended, is susceptible of such a construction, it could not be upheld as a constitutional exercise of legislative power under section 12 of the bill of rights. The provision of the constitution imposes upon the legislature the duty of exempting from seizure and sale, for the payment of any debt or liability, a reasonable amount of property, and of determining such amount by law. In the discharge of this duty, and the exercise of its undoubted power, its judgment and discretion, as to the amount of the exemption, and its reasonableness, are final and conclusive, and it may increase or diminish such amount from time to time, according to its own views of an enlightened policy. Beyond this, however, it cannot constitutionally go. Discrimination, in its exemption laws, between different classes of creditors and kinds of liabilities, is a species of class legislation which is absolutely prohibited. This must be regarded as the settled doctrine in this state."

And again in *Kelly* v. *Dill,* 23 Minn. 435, the court said:

"Section 12, art. 1, of the constitution provides that 'a reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability; the amount of such exemption shall be determined by law.' This does not determine the amount or character of the property to be exempted, nor how it shall be designated. No property could be claimed exempt under it until the legislature should determine to what property, and to what amount, the exemption should extend. *When determined by law, the exemption comes under the constitutional protection.*"

So it seems plain, that when the constitution provided that the legislature shall set apart a certain amount of property to be exempt from sale, in the exercise of that power, debts cannot be classified so as to give an exception in favor of laborers or materialmen performing labor or furnishing material for the improvement of the homestead.

The constitution of the state of Utah, Article XXII, Section 1, contains this provision:

"The legislature shall provide by law for the selection by each head of a family and exemption of a homestead, which may consist of one or more parcels of land, together with the appurtenances and improvements thereon, of the value of at least fifteen hundred dollars, from sale on execution."

Pursuant to this provision, the legislature passed a homestead act which provided that the homestead should be subject to execution sale in satisfaction of judgments obtained

on debts secured by mechanics' or laborers' liens for work or labor done, or material furnished exclusively for the improvement of the same. In the case of *Volker-Scowcroft Lumber Co.* v. *Vance* (Utah), 88 Pac. 896, the court was called upon to pass upon the constitutionality of that part of the homestead act referred to, and in holding that it contravened the constitutional provision, said:

"This, then, brings us to the question as to whether the homestead was subject to plaintiff's lien. This depends upon the validity of the statute, which in terms makes the homestead subject to execution in satisfaction of judgments obtained on debts secured by mechanics' and materialmen's liens. Mr. Boisot, in his work on Mechanics' Liens (Section 30), says: 'Under a constitutional direction to exempt from seizure for debt a reasonable amount of property, the legislature, after exempting homesteads from execution and sale, cannot make them subject to mechanics' liens; and where the constitution creates a homestead right, exempt from execution for debt except for payment of obligations contracted for its purchase, for taxes, for agricultural laborers' liens and for mechanics' liens for work done on the premises, an act attempting to give materialmen a lien on homestead is unconstitutional.' To the same effect is Thompson on Homesteads and Exemptions, where, at Section 16, the author in substance says that a constitutional provision which provides that the homestead shall be exempt from forced sale prohibits the legislature from subjecting it to sales for labor done or material furnished for its improvement. . . . The mandatory provisions of the constitution are that the legislature shall provide by law for the selection and exemption of a homestead from sale on execution. In the discharge of the duty imposed, the legislature may provide remedies for the protection of the homestead rights created and secured by the constitution and may regulate the claim of the right so that its exact limits may be known and understood, and may make supplemental legislation in particulars wherein they are not as complete as may be desirable, but all such legislation must be subordinate to the constitutional provision and in furtherance of its purpose, and must not, in any particular, attempt to narrow, defeat, or limit the homestead right as defined and secured by the constitution. . . . While the constitution has placed no inhibition to a voluntary alienation of a homestead, it has specifically exempted it, without exception, from all involuntary or execution sales. The statute providing that the homestead is subject to execution in satisfaction of judgments obtained on debts secured by mechanics' or laborers' liens for work and labor done or material furnished for its improvement, seeks to make the homestead subject to a particular kind of sale on execution, and this the legislature may not do. As before observed, the constitution has not prohibited a homestead claimant from selling or voluntarily encumbering a homestead, and he may make any kind of voluntary alienation of it, or encumber it, except as restricted by section 1155 of the homestead statute, which we need not here consider. Now, it may be said that the defendant, the homestead claimant, having herself voluntarily made and entered into the contract for the construction of the building on the homestead, and the material having been furnished by plaintiff in pursuance of it, therefore she voluntarily encumbered the homestead the same as though she had given a mortgage upon it. That would be true if by the terms of her contract she had pledged the homestead, or had given a lien on it as by law provided. . . . In the absence of an express contract creating it, the lien which a materialman or mechanic may become entitled to depends solely upon the statute for its existence. It is a preference which he may secure if he proceeds in a particular way and fully complies with the statutory requirements upon the subject, and not otherwise. Plaintiff's lien, so far as made to appear, has its origin alone in the statute and proceedings taken under it, and does not arise out of or upon any contract. The decree ordering the property sold in satisfaction of the judgment obtained rests alone for its authority upon the statute and not upon any contract made by the defendant, and hence the order of sale is clearly an execution sale within the meaning of the constitution. . . . If it is within the power of the legislature to subject the homestead to execution, in satisfaction of judgments obtained on debts for work and labor done or materials furnished for improvements of the same when the constitution has not made any such exception, then, why cannot the legislature subject it to execution in satisfaction of judgments obtained on other debts? To say that the legislature may do so when the debt grows out of something done or furnished for the improvement of the homestead, but may not do so if the debt arose in some other way, is making a distinction not made by the constitution itself. It may be, upon equitable principles, that the homestead should be made subject to such improvements. On an examination of constitutions of different states where homestead exemptions are provided for, we find in nearly all of them that the homestead, by the terms of the constitution, is made subject to improvements. . . .

"Without resorting to these proceedings, it is obvious that the constitutional provision exempts a homestead from execution sale without restriction, limitation or exception of any kind. The people in their constitution had a right to provide for any sort of a homestead and to guard it as they please, to subject it to restrictions or without restrictions, as in their wisdom they saw fit. When the people, through their constitution, have spoken and have thus exempted the homestead from execution sales without exceptions of any kind, neither the legislature nor the courts have power to subject it to any such sale. With the wisdom or equity of any such provision neither we nor the legislature have anything to do. Homestead rights are not founded upon equity. They are founded upon public policy for the protection of the home and the prosperity of the state, carrying out the policy of republics to encourage and multiply freeholders, the natural supporters and defenders of free government.

"We are of the opinion that the statute in question is in conflict with the constitution, and is void."

From the holding of the Utah court, it would seem equally plain, that where the constitution directed the legislature to provide for a homestead in a definite amount, no exception could be validly made in favor of the sale thereof to satisfy mechanics' and materialmen's liens.

The constitution of the state of Washington, Article XIX, has this provision as to the homestead:

"The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families."

Pursuant to this provision, the legislature in 1895 passed an act defining a homestead and providing for the selection of the same, by which act the homestead as therein defined is exempted from forced sale, except in specified cases, among which are sales to satisfy mechanics' and materialmen's liens. There are no decisions from this state passing upon the constitutionality of the exceptions created. In the case of *Olson* v. *Goodsell,* 56 Wash. 251, 105 Pac. 463, the court held that the filing of a declaration of homestead subsequent to the filing of a mechanic's lien would not operate to defeat the foreclosure and sale of the premises under a decree foreclosing the lien, but it does not appear from the opinion in that case that the unconstitutionality of the exceptions in the homestead act was called to the attention of the court. It would

appear, however, if the decisions from the other states in this group are to govern, that the exceptions in the Washington statute allowing the sale of the homestead to satisfy mechanics' and materialmen's liens are in contravention of the plain mandate of the constitution.

Texas, prior to 1868, had a constitutional provision substantially the same as now exists in the state of Washington, and the court in that state, in the case of *Sampson* v. *Keene,* 6 Tex. 102, held that the homestead could not be sold to satisfy a mortgage given on the premises because a sale under a decree of foreclosure was a "forced sale" not permitted by the constitution. This holding, no doubt, was one of the reasons why in the subsequent constitutions an express provision was inserted to permit the sale of the homestead for work and material used in constructing improvements thereon.

The other constitutional provisions of this last group are illustrated by the provisions herein noticed.

From the foregoing review of the constitutional provisions of the several states, and the decisions rendered thereunder, it seems to be pretty well established that where the constitution does not classify debts, the legislature is powerless to subject the homestead to certain debts when it has exempted it from others; that when the constitution directs the legislature to exempt the homestead, or a reasonable amount of property, from sale, the legislature may fix the amount of the exemption, if that is not fixed by the constitution, and may determine how the exemption or homestead may be claimed, but when it has done so the exemption or homestead then comes under the protection of the constitution. As said by the Minnesota court in the *Coleman* case, "Beyond this, however, it cannot constitutionally go."

W. F. MEIER.

FORMER PRESIDENT TAFT ON THE TRUST QUESTION.*

WORKINGMEN'S COMBINATIONS.

FORMER PRESIDENT WILLIAM HOWARD TAFT has contributed to the *New York Times* a series of luminous articles on the Federal Anti-Trust Law as remodeled by the courts. With the permission of the *Times,* LAW NOTES here gives its readers a number of extracts from the first article of this sound lawyer:

The Federal Anti-Trust Law is one of the most important statutes ever passed in this country. It was a step taken by Congress to meet what the public had found to be a growing and intolerable evil in combinations between many who had capital employed in a branch of trade, industry, or transportation, to obtain control of it, regulate prices, and make unlimited profit. Whether Congress intended it or not, it used language that necessarily forbade the combinations of laborers to restrain and obstruct interstate trade.

The statute, therefore, qualified three important phases of what we include in the general term "individual liberty"—the right of property, freedom to contract, and freedom of labor.

In this law Congress used general expressions, "restraint of trade," "monopoly," "combinations," and "conspiracy." It was passed in a country that recognized as controlling that customary law handed down to us from England, and known as the common law. It was drafted by great lawyers who may be presumed to have used those expressions with the intention that they should be interpreted in the light of common law, just as it has been frequently decided that the terms used in our Federal Constitution are to be so construed.

It is of the highest importance, therefore, to consider, as a preliminary basis for our discussion of the statute, what the common law was in respect to restraints of trade—that is, the limitation upon the right of property and the right of free contract, and also what its limitation was upon the right of one to dispose of his labor. Just what use should be made of the common law rules on these subjects in giving effect to the statute we can determine later.

The statute made unlawful a great number of business methods and plans all directed to the same purpose of suppressing competition and controlling prices, that until the passage of the act had been regarded merely as shrewd, effective, and justified in the struggle for success. Such methods had resulted in the building of great and powerful corporations which had, many of them, intervened in politics and through use of corrupt machines and bosses threatened us with a plutocracy.

Combinations of labor also in the field of interstate commerce had grown to most formidable proportions. A few years after the passage of the anti-trust statute Debs and the American Railway Union attempted to take the country by the throat and to stop the arterial circulation of interstate commerce in order to win a victory in the matter of better terms of employment for employes of a particular industrial company.

The statute was passed in 1890. It has, therefore, been nearly a quarter of a century on the statute book. It has had the benefit of construction by the Supreme Court of the United States in a series of most important cases which presented issues that have in their decision searched its meaning; and in spite of a great deal of assertion and intimation to the contrary, the effect of those years of litigation has been to give us a valuable and workable construction which any one who gives it sincere attention can understand and can follow in the methods of his business, in the use of his capital, or in the organization and rules of action of his trade union.

One difficulty in giving the public a clear understanding of the meaning and effect of the statute has been that it has been made a football of party politics, that shibboleths have been fabricated out of it without any clear understanding of the distinctions which the court has made, that results have been misrepresented and the superlatives of stump oratory have been substituted for a clear statement of the scope and operation of the law. Politicians have seized upon phrases that would attract the public eye, the meaning of which in the law they have not themselves understood, and have proposed amendments to accomplish purposes of a most indefinite character without knowing or caring how they were to operate, if only the pressing of the amendment gave them a ground for appeal for votes and for a claim to the gratitude of their constituents.

The statute dealt with a most difficult subject. The members of the Congress that passed it knew that it was a difficult subject. They made plain the object that they had in mind, and they used general expressions to accomplish it which they thought had had definition in existing law. The evil to be remedied was manifest, and they pursued the legislative course so often pursued before, of trusting to the learned, just and equitable construction of the courts to effect their legislative intention.

Let us now proceed to consider the history of the limitation upon the right to the use of property and the right of free contract when they were exercised in trade and business at common law, and we may then take up the right of free labor and the limitations upon it at common law.

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As early as the second year of Henry V., a restraint which any man put upon himself by contract not to engage in any branch of trade or labor was not legally binding on him and was unenforceable. This was in 1415. There is no authority that goes so far as to indicate that the making of such a contract was indictable, but the rule that it was void was without exception for two centuries. An effort to make an exception appears in the eighteenth year of James I., where it was held that a contract not to use a certain trade in a particular place was an exception to the general rule.

It was regarded as against the general interest of freedom of labor and trade to enforce a man's agreement to disable himself to earn his own livelihood, and so to become a charge upon the community. Probably that was the sole purpose at first. Later on the kings exercised the power to grant the privilege to individuals of exclusive dealing in particular trades, and they did this by patents for monopolies. Naturally such an exclusion of all others from any particular business or trade by arbitrary royal act stirred the indignation of the people and the abolition of those statutory monopolies followed.

Meantime there had arisen abuses growing out of the attempt on the part of traders to exclude others from the sale of foodstuffs and other necessities of life by what was called engrossing or regrating; that is, by cornering the market and enabling them to raise and exact exorbitant prices. These were made the subject of statutes punishing them as crimes. As the results of the royal monopoly and of the cornering by engrossing and regrating were in more or less degree the same, there came to be a confusion of the terms, and the word "monopoly" came to be applied also to the result in the cornering of the market.

The history and growth of the exceptions to the at first absolute rule avoiding all restraints of trade are interesting and important, and their development has continued down to very recent years. The absolute restriction proved in some ways to be embarrassing to trade rather than in the interest of its freedom. If a man had a business and wished to sell it, with its good will, he could get a better price if he could lawfully bind himself not to interfere with that business which he was selling by engaging in the same business within the same territory. This was in the interest of the purchaser, because he wished to secure the benefit of his bargain, and make legitimate profit out of it, and it was not contrary to the public interest because it did not affect that in the slightest. The condition of trade was not changed by the transfer from the one to the other, and the status quo was maintained by the agreement.

Of course, if the restraint upon the seller's going into business was larger in its scope than the business which he sold, either in the matter of territory or in the character of the business, it was beyond the proper and legitimate purpose of such a restraining term of the contract. Therefore, it was held to exceed the just limits of the exception to the old rule and to be unreasonable and unenforceable. It was not punishable as an offense; it was merely a term of the contract for the breach of which the other party could not recover damages, and in respect to which a court of equity would not aid him.

The instance of sale of a business with its good will is only one of a number of analogous cases in which a contract restraining the contractor in his future trade or business was deemed to be germane and legitimately adapted to the lawful purpose of the principal contract, and, therefore, enforceable as part of it if the restraint was limited in its terms to the needs of the main transaction. Another instance was that of an agreement by a retiring partner not to compete with the firm which he had just left, which was quite analogous to the sale of a business and its good will to a stranger.

A third instance was that of one entering a partnership stipulating that while he was a member of it he would not do anything to interfere by competition or otherwise with the business of the firm, which presents an exact analogy to the two previous cases. A fourth was where one sold property to another, and that other agreed not to use the property in competition with the business retained by the seller. In this case it was held proper for the owner of the property, who had full liberty either to sell or not to sell, to prevent injury to himself and his business by taking a contract from the buyer not to use it for such purpose.

A fifth instance was where an assistant or servant or agent entering upon a contract of service agreed, as an incidental term, not to compete with his master or employer after the expiration of his time of service. This was to protect the employer in his business from damage or loss caused by the unjust use on the part of the employe of the confidential knowledge he might acquire in such business.

It is conceivable that other instances might arise in which exceptions would be made at common law to the general rule preventing the enforcement of restraints upon the contractor's trade, though after a thorough search of the authorities I do not find any other instance suggested.

These exceptions were made because it was said that they were reasonable restraints of trade. Now, they were reasonable not because in a general way the judges thought they would not hurt anybody under the particular circumstances, but they were held to be reasonable as measured by the lawful purpose of the principal contract to which they were subsidiary and ancillary.

This gave a definite limit for judicial discretion. It laid down the purposes to which such a contract must be confined, and it was not open to the criticism that it enlarged judicial discretion into legislative action. I do not think that any well-reasoned and well-supported case can be found in which an agreement has been enforced by the courts of England or of this country, where the main object was either to get or keep another man out of business or to restrict his business in quantity, prices, or territory. When no other purpose than one of these is manifested in the contract it has always been unenforceable at common law.

It used to be said that partial restraints of trade would be enforced, if they were reasonable. The expression "partial" was not a happy one, and it was rejected later on, because there came before the courts instances in which ancillary contracts of this character had to be not partial but general, had to include the whole realm, or it might be the whole world. For instance, where a man was engaged in the manufacture of large ammunition, great guns, or war material that to be profitable must be sold chiefly to sovereign governments in which he had established a good will that was world-wide, and he wished to sell that establishment and his business to another. If he was to secure a good price and that other was to receive the good and world-wide business which he paid for, it was reasonable to provide in the contract of sale, as a term of it or as ancillary to it, that the vendor in such a sale would not go into the same business at all or anywhere.

What I wish to insist upon and emphasize as much as I can is that when it is said that a contract in restraint of trade was reasonable at common law, it was not a contract in which the restraint was the sole or chief object of the contract. The restraint was a mere instrument to carry out a different and lawful purpose of the main contract. . . .

Therefore, we find that the state of the common law, when the Anti-Trust Law was passed in England, and presumably in

this country, was that contracts in restraint of trade, in so far as they restrained a party to the contract, were void, unless they were reasonable in the sense that they were merely ancillary to a main contract which was lawful in its purpose and reasonably adapted and limited to that purpose, and that all contracts or combinations in which the contracting parties agreed to combine to restrain the trade of a third party or affect it injuriously were void at common law, without exception, and there were no reasonable contracts or combinations in restraint of trade of that kind. When one party to such a contract sought to enforce it against another, the court left both where it found them and gave no aid to either.

Our anti-trust statute, however, now makes such restraints, which were thus only void and unenforceable at common law, positively and affirmatively illegal, actionable and indictable.

I now wish to invite attention to another branch of the common law which is important in construing this anti-trust statute. I refer to the line between legal and illegal combinations of workmen. It has been frequently said that at common law a combination among laborers to raise their wages was illegal. I think this untrue. There were statutes punishing laborers for combining in this way, but it was not illegal at common law. Lord Bramwell, in *Mogul Steamship Company* v. *McGregor*, said:

"I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence, was lawful at common law."

And while cases can be found in this country in which the illegality of combinations of laborers for this purpose has been asserted, they cannot be sustained. But it is one thing to say that a combination of laborers to cease work in order to secure a raising of wages or more favorable terms of employment is not actionable, and it is quite another thing to say that such combination for other purposes and to accomplish other results may not have been actionable at common law. The great weight of authority is that in certain cases they were.

It may reduce the employer's profits if he is obliged to pay his workmen on a higher scale of wages when they combine to leave his employment. The loss which he sustains, if it can be called such, arises merely from the exercise of their lawful right to work for such wages as they choose and to get as high rate as they can. The loss is caused by the workmen, but it gives no right of action against them.

Again, if workmen are called upon to work with the material of a certain dealer and the material is of such character as to make their labor greater or more dangerous than that sold by another, they may lawfully agree that they will refuse to work with such material. The loss caused by such joint action of the workmen to the employer or the materialman is not a legal injury, and not the subject of action. The issue the workmen make and the purpose they have relate normally and directly to the terms of their employment and the work they have to do.

But on this common ground of common rights, where participants in business and manufacture and trade, employers and employes, are lawfully struggling against each other in peaceful methods for their best interest and where losses suffered in the struggle must be borne, there are losses which are actionable, willfully caused by combinations in the exercise of what otherwise would be a lawful right, because of the indirect and unjustifiable means taken to accomplish the end sought. They may not use a lockout or a strike threat of either, or a withholding of patronage, or a threat of it to compel third persons to join them in the fight which they are lawfully making with their competitors, their employes, or their employers.

This is a secondary boycott, so called. The essence of its illegality is in the coercion of third persons to lend assistance in a legitimate competition in business or a perfectly lawful contest between employers and employes in which each may use against his rival or opponent his right of patronage, his right of labor or his right of employment as he will, but in which he may not by the same means coerce others to join him in the fight against their will. This view of the law has been taken in many cases in this country, and while there have been some dissenting opinions, it has now been embodied in many statutes. A person injured by such a secondary boycott may invoke the action of the common law courts in a suit for damages, or the courts of equity by way of injunction.

A secondary boycott has such possibilities in the way of injuring the whole community, of bringing into contests that are none of their own making so many indifferent and innocent persons, that ethics and law and public policy all require the recognition of the distinction which makes lawful the combination of workingmen against employers as in their natural controversies over wages and terms of employment, but denounces the use of combination by either party to compel third persons against their will to come into the fight.

The suggestion is made that the workingmen ought to be allowed to use the secondary boycott, because if they do not then they will resort to force. This seems to be a very poor argument. It assumes that militancy and the use of criminal means to further a cause should be recognized as an effective method of changing law.

The proper reason for the legality of a combination of laborers to raise prices is to be found in the necessity for enabling them to deal on an equality with their employers. If they did not have this power they would be at the mercy of employers who have capital and resources, and who are not compelled to live from day to day on their daily earnings. The power to cease employment together, that is to strike, is a most useful and legitimate weapon to bring their employers to terms. But why should they be permitted to use the strike to threaten persons with whom they have no normal relation not to continue business with their employers on pain of being brought into the controversy and themselves being subjected to similar treatment?

But it is said the right of labor is free. It is like any other right: it is free to use for a lawful purpose. But it is not free when it is used in a combination that effects such injustice as that I have described. To use the language of Mr. Justice Holmes speaking for the Supreme Court in *Aikens* v. *Wisconsin*, 194 U. S. 205:

"No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

And so why should the right of labor be used to coerce third persons and thus bring about a result which will terrorize a community, as it did in the Debs case when the combination of the American Railway Union took the public by the throat and said: "We will starve your babies, we will prevent your food coming to you by stopping these railroads unless you intervene between Pullman and his employes and compel Pullman to pay higher wages than he is now willing to pay them"?

"It would not . . . be tolerable for a court administering equity to seize upon a technicality for the purpose or with the result of entrapping either of the parties before it." Brewer, J. Reagan *v.* Farmers' L. & T. Co., 154 U. S. 401.

Cases of Interest.

ENFORCEMENT BY COURTS OF CANONS OF PROFESSIONAL ETHICS ADOPTED BY BAR ASSOCIATIONS.—In Ringen *v.* Ranes, (Ill.) 104 N. E. 1023, the court refused to set aside a conveyance obtained by an attorney from his client for services rendered the client although it appeared that the methods adopted by the attorney to secure his employment were unprofessional, and indicated an inferior standard of professional conduct, and were in direct violation of the canons of professional ethics adopted by the Illinois State Bar Association. The court said: "Those canons are not of binding obligation and are not enforced as such by the courts, but they constitute a safe guide for professional conduct in the cases to which they apply."

RIGHT OF MIDDLEMAN TO ACCEPT COMPENSATION FROM BOTH VENDOR AND VENDEE.—The case of Peters *v.* Riley, (W. Va.) 81 S. E. 530, is authority for the proposition that a mere middleman in a sale of land may consistently accept compensation for his services from both vendor and vendee. The court said: "Double agency and bad faith are the grounds of the prayer for a peremptory instruction to find for the defendant and the motion to set aside the verdict. The latter contention has been sufficiently discussed, and the former is untenable. The evidence does not establish or tend to prove any agency other than that of mere brokerage. The plaintiff was not authorized by the defendant to make a contract of sale for him. All the essential elements of the contract remained in the sole and exclusive control of the defendant. The plaintiff was a mere intermediary, having no power or authority to do more than find a purchaser and bring the parties together to formulate their own contract and fix its terms and conditions. In such a case, the acceptance of compensation from both parties is unobjectionable."

ORDINANCE REGULATING BILLBOARDS AS APPLICABLE TO FENCES DISPLAYING ADVERTISEMENTS.—In Cream City Bill-Posting Co. *v.* City of Milwaukee, Wis. 147 N. W. 25, an ordinance specifying how structures intended for advertising purposes should be constructed and prohibiting the use of structures not so constructed was held not applicable to a fence which was incidentally used for the display of advertisements. The material part of the opinion of the court, written by Barnes, J., was as follows: "The ordinance applies only to such structures as are built to be used for advertising purposes. If the landowner desires to inclose his lot, he may build a fence around the same and he may permit advertisements to be placed thereon. If, however, the fence is built to be used simply for advertising purposes, then the terms of the ordinance must be complied with. So too as to buildings which are constructed for other purposes than that of being used for billboards, the owners may allow advertising matter to be placed therein without subjecting themselves to the pains and penalties of the ordinance in question. If a shell of a building should be put up simply for the purpose of using its exterior walls for advertising purposes, it would to all intents and purposes be a billboard, and in such a case it should properly enough fall within the terms of the ordinance."

LIABILITY OF ELECTRIC LIGHT COMPANY FOR DEATH OF BOY OF TWELVE DUE TO COMING IN CONTACT WITH UNINSULATED WIRE IN TREE.—In Benton *v.* North Carolina Public Service Co. (N. C.) 81 S. E. 448, it was held that an electric light company was liable for the death of a boy of twelve due to his coming in contact with an uninsulated high-power wire while climbing a tree. Brown, J., for the court said: "It is immaterial to consider whether the boy killed was a trespasser. He certainly was not trespassing upon any property of the defendant. He was one of the general public who had a right to expect that the defendant would keep its wires in a reasonably safe condition. Besides, he was a child of immature years, who could not reasonably be expected to appreciate the danger of approaching electric light wires, and could not exercise that care which a mature person would exercise. The case of Temple *v.* Electric Light, etc., Co., 89 Miss. 1, 42 So. 874, 11 L. R. A. N. S. 449, 119 Am. St. Rep. 698, 10 Ann. Cas. 924, is practically on all fours with this case. That case holds that an electric light company is liable for injury resulting to a boy by coming in contact with an uninsulated wire while climbing a tree, whose branches extended close to the ground, and through which the wire passed, as the company might reasonably expect small boys to climb such trees from their immemorial habit of doing so, and that the company must take notice of such habit in insulating its wires as safely as is practicable, and use the highest measure of care and skill to prevent injury. It is held in the opinion: It is perfectly idle for the appellee to insist that it was not bound to have reasonably expected to have the small boys of the neighborhood climb that sort of a tree. The fact that a boy would very likely climb such a tree as it was, was a fact that, according to every principle of law and sound common sense, this company must have appreciated. The immemorial habit of small boys to climb little oak trees with small branches reaching almost to the ground is a fact of which a corporation must take notice. While the decisions are not in accord upon the question of the duty and liability to children of electric light companies, who maintain highly charged wires, the principle announced in the aforesaid case finds support, not only in reason and a sound policy, but in a number of decided cases."

VALIDITY OF STATUTE RELATING TO SHIPMENT OF CREAM.—In State *v.* Chicago Great Western R. Co., Minn. 147 N. W. 109, the Supreme Court of Minnesota held invalid a statute providing as follows: "The shipment of cream for a distance of more than sixty-five miles, over any railroad line in this state, except when such shipment is made in a refrigerator car, which car shall be kept at all times effectively iced and in a thoroughly sanitary condition, unless said cream shall have previously undergone an effective process of pasteurization, is hereby prohibited." The ground of the decision was that it was an unreasonable interference with and prohibition of interstate commerce. The court said: "It cannot, without violence to its language, be construed as applicable only to shipments originating and terminating within this state, though we are not to be understood as holding that such a limitation would render the act free from constitutional objections. The purpose of the statute is not clear. Just what public interest was intended to be protected, or what evil remedied, is not apparent. It is clear, however, that it cannot be construed as having any reference to public health, or in the interest of pure food. It takes no account of the condition or quality of the cream, the shipment of which it prohibits, and cream of any kind, regardless of its condition as to purity or wholesomeness, may be shipped without restriction, if the transportation be made in a refrigerator car. A dozen cans of the most wholesome and a dozen cans of the most putrid and unwholesome cream may be transported in the same refrigerator car, and the statute be not violated. So that the feature of public health must be dismissed, as having no reference to the foundation of the statute. What other public interest, if any, was intended to be protected, we need not stop to inquire. The statute can be upheld, if at all, only as an exercise of the police power of the state. And though that power

in the state is not in all respects subordinate to an exercise of the same power by the federal government, and the state may in the exercise thereof enact such remedial laws as the legislature may deem for the best interests of the public, the state may not by such legislation unnecessarily or unreasonably impair or burden interstate commerce, the right to regulate and control which is reserved to the federal Congress."

LIABILITY OF PUBLIC AMUSEMENT COMPANY FOR INJURY SUSTAINED BY PERSON WHILE PASSING THROUGH TURNSTILE.—A negligence case with unusual circumstances is Marx *v.* Ontario Beach Hotel & Amusement Co., (N. Y.) 105 N. E. 97. It appeared therein that the defendant maintained a place for public amusement and entertainment known as Ontario Beach Park. At the entrances there were offices where tickets were sold, which were taken up by attendants stationed at turnstiles that registered the admissions. On a certain evening the plaintiff and two companions visited this park. The plaintiff purchased three tickets, which she gave to one of her companions, who handed them to the attendant and proceeded through the stile. The plaintiff's other companion followed, and then came the plaintiff. At the instant when the plaintiff reached the stile, the attendant is said to have given a quick and violent backward movement to the arms of the stile, one of which struck the plaintiff upon the abdomen with such force as to result in a physical condition which subsequently necessitated a serious surgical operation. The reason given by the plaintiff and her witnesses for this conduct on the part of the attendant was that the latter erroneously assumed that a boy who had just passed through the stile belonged to the plaintiff's party, and that the plaintiff had handed in only three tickets for four admissions. When the plaintiff disclaimed any responsibility for the boy, the attendant released his hold upon the stile, and the plaintiff was admitted to the park. It was held that a cause of action for negligence was shown by these facts. The court said: "Counsel for the defendant invokes the rule that there can be no legal liability for an accident which is so rare, unexpected, and unusual that it is not to be anticipated in the exercise of reasonable care. . . . Where negligence of a person is predicated of a person upon some omission of duty, it is always necessary to inquire whether the dereliction is of such a character as will be likely to invite or produce injury to others. It is different, however, when the alleged negligence consists in some affirmative and wrongful act, for in such a case the wrongdoer is not excused by his failure to foresee the consequences. In the case at bar the act of the defendant's employee was of such a nature that the jury were authorized to find it both negligent and wilful, and it is imputable to the defendant under the law of respondeat superior."

LIABILITY OF OWNER OF AUTOMOBILE FOR NEGLIGENCE OF ONE DRIVING IT TEMPORARILY AT INVITATION OF DAUGHTER.—In Kayser *v.* Van Nest, Minn. 146 N. W. 1091, a judgment of the lower court directing a verdict for the defendant in an action for damages due to a collision between an automobile owned by the plaintiff and one owned by the defendant was reversed on the following facts: The defendant kept his car for the use, convenience, and pleasure of himself and the members of his family. It was usually driven by his daughter, nineteen years of age, and she was authorized to use it whenever she desired to do so. On the day of the accident, she took it and, accompanied by a younger sister, drove to the home of a relative, where they were joined by other young people. From this point the daughter permitted a cousin, then riding with them, to drive the car, and the accident is alleged to have occurred by reason of his negligence. The evidence as to such negligence was sufficient to require the submission of the case to the jury if the defendant was liable therefor. The lower court held as a matter of law that defendant was not responsible for the acts of either his daughter or her cousin at the time of the accident, and directed a verdict in his favor upon that ground. In reversing the judgment of the court below the Supreme Court said: "Defendant's daughter, while operating the car by his authority and upon his business, was defendant's servant within the meaning of the rule, and he was responsible for her acts to the same extent that he would have been responsible for the acts of any other servant. Defendant might properly make it an element of his business to provide pleasures for his family; and, as the car was intended for the use of the members of the family for purposes of pleasure as well as for other purposes, and the daughter had authority to take it and operate it for such purposes, it was at least a question for the jury whether, at the time of the accident, she was not the servant of defendant and engaged upon the business of defendant. . . . Defendant contends that even if he is responsible for the acts of his daughter he is not responsible for the acts of the third party who was operating the car at the time of the accident. The daughter remained in the car, and, although not personally operating it, had not relinquished control over it, nor turned it over to another to use for his own purposes. It was still being used in furtherance of the purpose for which she had taken it out."

VALIDITY OF STATUTE PROVIDING FOR A MINIMUM WAGE FOR TEACHERS AND MAKING ITS VIOLATION A MISDEMEANOR.—Iowa has a statute providing a minimum wage for teachers and making it a misdemeanor for school officers to contract for or to pay a less wage. This statute has been held constitutional in the recent case of Bopp *v.* Clark, (Ia.) 147 N. W. 172, for reasons stated by the court as follows: "The school district is a creation of the legislature. Its powers and the method of their exercise are all defined by legislative act. In like manner the powers and duties of its officers are defined. Such officers have no powers except such as are conferred by legislative act. Prior to the act in question the power of the school officer to make contracts with teachers was conferred by section 2778 of the code. If the legislature was within its authority in conferring such power upon school officers, it necessarily had the same authority to enlarge or to abridge the same. Appellant's counsel concedes that the legislature would have had authority to fix a maximum wage. Accepting this concession, it would seem to follow of logical necessity that it had equal authority to fix a minimum wage. The argument at this point is that the statute in question interferes with the right of the particular teacher to accept such wages as he will, whether below the statutory schedule or not. The manifest purpose of the law is to offer and maintain an inducement to higher standards in the profession of teaching and to encourage competition in qualifications among teachers rather than in the amount of wages. Even teachers whose acquired standards may be equal, as indicated by their respective certificates, may yet vary greatly in their practical success as teachers. As to such teachers, school officers would naturally select the best in preference to the worst, unless such best were underbid in the competition. The purpose of the statute is to eliminate competition at this point below the specified rate. It is a matter of common observation that school officers are sometimes large taxpayers who have no children dependent upon the public schools for their education. Such officers are under constant temptation to overemphasize the importance of low wages for teachers and to attach too little importance to the qualifications of teachers. In such cases, the lowest bidder obtains the em-

ployment, and this often to the great detriment of the public interest. . . . Whether the practical working of this legislation will meet the intended purpose can be determined only by experience. All new legislation is necessarily experimental and in a sense tentative. The courts cannot be called upon to guarantee its wisdom nor to condemn it for want of wisdom. All that we hold here is that the legislation in question herein is within the domain of legislative authority."

RIGHT OF PARENT TO ADVISE MARRIED DAUGHTER AS TO HER DOMESTIC AND MARITAL AFFAIRS.—Cold comfort is afforded husbands by the recent decision of the Iowa Supreme Court in the case of Pooley *v.* Dutton, 147 N. W. 155, which recognizes the right of a parent to advise a married daughter as to her domestic and marital affairs whether such advice be wise or unwise, provided he is not actuated by malice. Judge Weaver for the court says: "Upon this subject the following language of Chancellor Kent in Hutcheson *v.* Peck, 5 Johns. (N. Y.) 196, has often been quoted with approval: 'A father's house is always open to his children; and, whether they be married or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum. The father is under even a legal obligation to maintain his children and grandchildren, if he be competent, and they unable to maintain themselves; and, according to Lord Coke, it is "nature's profession to assist, maintain, and console the child." I should require, therefore, more proof to sustain the action against the father than against a stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband, from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed.' In the same case it was also said by Spencer, J., that, even though the amount of the verdict returned might not be held excessive, as a matter of law, it was still within the province of the court, under the peculiar circumstances, to regard the amount of damages so allowed in exercising its discretion in awarding a new trial. Upon the same subject the Indiana court has said: 'All legitimate presumptions, in such cases, must be that the parent will act only for the best interests of the child. The law recognizes the right of the parent, in such cases, to advise the son or daughter; and, when such advice is given in good faith, and results in a separation, the act does not give the injured party a right of action. . . . The motives of the parent are presumed good until the contrary is made to appear.' Reed *v.* Reed, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310. It has also been held that the use of violent language and denunciation on the part of a parent upon learning of the clandestine marriage of his child to a person of whom he disapproved is not of itself sufficient to sustain a charge of malice in an action of this nature. Rubenstein *v.* Rubenstein, 60 App. Div. 238, 69 N. Y. S. 1067; White *v.* Ross, 47 Mich. 172, 10 N. W. 188. In Okman *v.* Belden, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396, after stating the right of a parent to urge the daughter to leave her husband if he believes it necessary to her health, happiness or peace of mind, the court adds: 'Whether the persuasion or the argument is proper and reasonable, under the conditions presented to the parent's mind, is also always to be considered. It may turn out that the parent acted upon mistaken premises, or upon false information, or his advice and his interference may have been unfortunate; still, we repeat, if he acts in good faith for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband.' The foregoing precedents fairly indicate the trend of the authorities. . . . They do not, of course, excuse, much less justify, the parents of a wife in enticing her from her husband to gratify their spite, malice or ill will toward him, but they do sustain the right of the father and mother to give a married daughter such advice and counsel as they honestly believe is for her best interest, and in so doing they incur no liability to the husband, even though their action is unwise and productive of harm rather than good."

LIABILITY OF HOSPITAL MAINTAINED AS CHARITABLE INSTITUTION FOR WRONGFUL ACTS OF PHYSICIANS AND NURSES.—It is well settled that a hospital maintained as a charitable institution is not liable for the negligence of its physicians and nurses in the treatment of patients, and in Schloendorff *v.* Society of New York Hospital (N. Y.) 105 N. E. 92, the rule is extended to include trespasses committed by its physicians and nurses. The facts in the case were as follows: In the year 1771, by royal charter of George III, the Society of the New York Hospital was organized for the care and healing of the sick. During the century and more which has since passed, it has devoted itself to that high task. It has no capital stock; it does not distribute profits; and its physicians and surgeons, both the visiting and the resident staff, serve it without pay. Those who seek it in search of health are charged nothing if they are needy, either for board or for treatment. The well-to-do are required by its by-laws to pay $7 a week for board, an amount insufficient to cover the per capita cost of maintenance. Whatever income is thus received is added to the income derived from the hospital's foundation, and helps to make it possible for the work to go on. The purpose is not profit, but charity, and the incidental revenue does not change the defendant's standing as a charitable institution. To this hospital the plaintiff came in January, 1908. She was suffering from some disorder of the stomach. She asked the superintendent or one of his assistants what the charge would be, and was told that it would be $7 a week. She became an inmate of the hospital, and after some weeks of treatment, the house physician, Dr. Bartlett, discovered a lump, which proved to be a fibroid tumor. He consulted the visiting physician, Dr. Stimson, who advised an operation. The plaintiff's testimony was that the character of the lump could not, so the physicians informed her, be determined without an ether examination. She consented to such an examination, but notified Dr. Bartlett, as she said, that there must be no operation. She was taken at night from the medical to the surgical ward and prepared for an operation by a nurse. On the following day ether was administered, and, while she was unconscious, a tumor was removed. Her testimony was that this was done without her consent or knowledge. Following the operation, and, according to the testimony of her witnesses, because of it, gangrene developed in her left arm, some of her fingers had to be amputated, and her sufferings were intense. The action was brought against the hospital charging them with liability for the wrong. It was held that the hospital was not liable. The court, speaking through Cardozo, J., said: "In the case at hand, the wrong complained of is not merely negligence. It is trespass. Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages. . . . This is true, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained. The fact that the wrong complained of here is trespass, rather than negligence, distinguishes this case from most of the cases that have preceded it. In such circumstances the hospital's exemption from liability can hardly rest upon implied waiver. Relatively to this transaction, the plaintiff was a stranger. She had never consented to become a patient for

any purpose other than an examination under ether. She had never waived the right to recover damages for any wrong resulting from this operation, for she had forbidden the operation. In this situation, the true ground for the defendant's exemption from liability is that the relation between a hospital and its physicians is not that of master and servant. The hospital does not undertake to act through them, but merely to procure them to act upon their own responsibility. That view of the relation has the support of high authority. . . . The defendant undertook to procure for this plaintiff the services of a physician. It did procure them. It procured the services of Dr. Bartlett and Dr. Stimson. One or both of those physicians (if we are to credit the plaintiff's narrative) ordered that an operation be performed on her in disregard of her instructions. The administrative staff of the hospital believing in good faith that the order was a proper one, and without notice to the contrary, gave to the operating surgeons the facilities of the surgical ward. The operation was then performed. The wrong was not that of the hospital; it was that of physicians, who were not the defendant's servants, but were pursuing an independent calling, a profession sanctioned by a solemn oath, and safeguarded by stringent penalties. If, in serving their patient, they violated her commands, the responsibility is not the defendant's; it is theirs. There is no distinction in that respect between the visiting and the resident physicians. Whether the hospital undertakes to procure a physician from afar, or to have one on the spot, its liability remains the same."

New Books.

A Treatise on the Law of Carriers. Second edition. By Dewitt C. Moore, of the Johnstown (New York) Bar. Three volumes. Pp. 2444+cclxxxii. Albany, New York: Matthew Bender & Company. 1914.

The first edition of Moore on Carriers was published in 1906. It was a one volume work, and therefore by no means exhaustive. However, it was carefully prepared and edited, and was so satisfactory to the profession that high words of praise were accorded the author from every quarter. Especially did it receive the commendation of the bench, being considered by judges of great learning to be a sound and safe guide. In the present edition Mr. Moore has widened the scope of the work materially, and instead of a one volume work there are now three large volumes. The chapters of the first edition have been revised and amplified and brought down to date by the later decisions, and new chapters treating of new topics of great and growing present interest and importance have been added. The writer states that his aim has been not only to present to his brethren in an engrossing profession the latest cases in the various jurisdictions, but also to show the reason, source, and foundation of the principles and rules set forth and the authorities by which they have been established and are maintained. He has aimed to show the present law and the specific rules applicable in a multitude of cases, in an orderly arranged, concise form, easily accessible and readily adaptable to the use of the practitioner. Volume one contains a chapter devoted to carriers generally. Then comes a chapter relating to common carriers. This is followed by chapters relating to carriers of goods, their duties and liabilities; the commencement and termination of their liability; liability of carrier for loss or damage, and delay, and as a warehouseman; and limitation of liability. There are also short chapters treating the carrier's relation to goods, and authority of agents; negligence of carrier; contributory negligence of shipper; and presumptions and burden of proof. Volume two contains chapters on damages for loss or delay in transporting goods; carriers' liens and charges; demurrage and liability of consignee or owner for delay; discrimination and overcharge; connecting carriers; carriers of live stock; carriers of passengers, their duties and liabilities, including their duty with regard to a passenger's baggage, and their liability for his ejection. Volume three continues the discussion of the principles governing carriers of passengers and treats of limitation of liability; presumptions and burden of proof; evidence; contributory negligence; and damages. The volume closes with a concise treatment of interstate transportation, wherein is considered the Interstate Commerce Act of 1887 and its important amendments, including the Carmack amendment, which makes the initial carrier liable for loss or damage on connecting lines. The Harter Act, limiting the liability of owners of vessels, also receives consideration at the hands of the author. There is an appendix of the various Acts of Congress relating to carriers such as the Interstate Commerce Act, Safety Appliance Acts, Hours of Service Act, etc. The index is adequate and renders the matter treated in the three volumes accessible to the reader. The examination of Mr. Moore's present edition has demonstrated to our satisfaction that it is worthy a place on the bookshelves of the profession.

News of the Profession.

The Washington State Bar Association will meet in Wenatchee, Wash., on August 5 and 6.

The Maryland State Bar Association will hold its annual meeting at Cape May, N. J., on July 1, 2 and 3.

County Judge Resigns Office.—Henry Thrasher, presiding judge of the County Court of Texas county, Mo., resigned from the bench on June 2.

New Assistant Attorney General.—President Wilson has appointed Charles Warren, of Boston, Assistant Attorney General of the United States.

Iowa District Judge Resigns.—Clarence Nichols resigned from the bench of the District Court of Iowa, Seventeenth judicial district, on May 31.

Fuller Bust in Capitol.—A marble bust of Melville W. Fuller, former Chief Justice of the United States, is to be erected in the Supreme Court Chamber.

The Georgia Bar Association met in annual convention at Tybee Island, on June 18, 19 and 20. Further particulars will be given in Law Notes for August.

The Wisconsin State Bar Association held its annual meeting at Green Bay, Wis., on June 24 and 25. The next issue of Law Notes will contain further particulars.

Woman's Bar Association.—The first woman's bar association in Illinois has been formed by students in Chicago. It will be known as the Woman's Law Association of Illinois.

Appointed to Bench in Kentucky.—George B. McIntyre, of New Albany, Ky., has been appointed judge of the Kentucky Circuit Court, Floyd County, to succeed Judge W. C. Utz, deceased.

NEW JUDGE IN VIRGINIA.—Peter H. Dillard, of Rocky Mount, Va., has been appointed to the bench of the Thirtieth Judicial Circuit Court of Virginia, to succeed the late Judge J. Lawrence Campbell, of Bedford.

APPOINTED ASSISTANT UNITED STATES ATTORNEY.—W. E. Allen, of Dallas, Tex., has been appointed Assistant to United States District Attorney James Wilson of the western district of Texas.

PENNSYLVANIA BAR ASSOCIATION.—The annual meeting of the Pennsylvania Bar Association was held at Erie, Pa., on June 30, July 1 and July 2. Further mention of the meeting will be made in next month's LAW NOTES.

NAMED CHIEF JUSTICE OF DISTRICT OF COLUMBIA.—Representative J. Harry Covington, of Easton, Md., has been nominated by President Wilson to be chief justice of the District of Columbia Supreme Court.

OHIO STATE BAR ASSOCIATION.—It has been announced that District Attorney Charles S. Whitman, of New York, will be the principal speaker before the annual meeting of the Ohio State Bar Association, at Cedar Point, O., on July 7.

NEW JERSEY STATE BAR ASSOCIATION.—The annual meeting of the New Jersey State Bar Association was held at Atlantic City, N. J., on June 12 and 13. A more detailed account of the meeting will be given in next month's LAW NOTES.

NORTH CAROLINA BAR ASSOCIATION.—The sixteenth annual meeting of the North Carolina Bar Association was held at Wrightsville Beach, N. Car., on June 29, June 30, and July 1. Further particulars will be noted in the August issue of LAW NOTES.

APPOINTED JUDGE IN NEW JERSEY.—Governor Fielder of New Jersey has appointed Robert Williams, of Paterson, former member of the Board of Public Utilities Commission, as Judge of the Court of Errors and Appeals, to succeed the late Judge Joseph W. Congdon.

DEATH OF NEW JERSEY JUSTICE.—Willard P. Voorhees, Associate Justice of the Supreme Court of New Jersey, died at New Brunswick, N. J., on June 1, aged 63. He was appointed to the Supreme bench by Governor J. Franklin Fort in 1908 and his term would have expired in 1915.

APPOINTED FEDERAL JUDGE IN ALABAMA.—Representative Henry D. Clayton has been appointed to the Federal bench in Alabama by President Wilson and has retired from Congress after seventeen years of continuous service. Judge Clayton succeeds the late Judge Thomas G. Jones.

UNITED STATES ATTORNEYS NAMED.—President Wilson has appointed Perry B. Miller, of Morganfield, Ky., to be United States attorney for the western district of Kentucky, and Clarence Merritt of McKinney, Tex., to be United States attorney for the eastern district of Texas.

OFFICERS OF CHICAGO BAR ASSOCIATION.—The officers of the Chicago Bar Association for the coming year were elected on June 5, as follows: President, Mitchell D. Follansbee; vice-presdents, Charles S. Cutting and Joseph W. Moses; secretary, Richard S. Folsom; treasurer, William Brown, Jr.; librarian, Carlos P. Sawyer; members of the board of managers, Stephen A. Foster, Roswell B. Mason, and Edwin A. Munger. The secretary, treasurer, and librarian were reëlected.

MASSACHUSETTS JUDICIAL APPOINTMENTS.—Governor Walsh of Massachusetts has made the following appointments to the bench: Collen C. Campbell of Provincetown, special justice of the First District Court of Barnstable County, to succeed Charles C. Paine, resigned; Thomas C. Malley of Springfield, special justice of the Springfield Police Court, to succeed J. F. Malley, resigned; Samuel W. McCaslin of Wellfleet, special justice of the Second District Court of Barnstable County.

COMMISSION NAMED TO REVISE MISSOURI LAWS.—Governor Major of Missouri has appointed the following commission of prominent lawyers to revise the criminal and civil codes of practice of the state and submit their recommendations to the next General Assembly: Judge Elijah Robinson, Edward J. White and John I. Williamson of Kansas City; Judge Wm. M. Williams of Boonville; Judge David H. Harris of Fulton; Judge Alonzo D. Burnes of Platte City; Colonel John W. Hilliburton of Carthage; Judge Albert D. Nortoni, Frederick N. Judson, Judge Hugo Muench, Charles P. Williams, J. Lionberger Davis and Breckenridge Long of St. Louis.

DEATH OF OKLAHOMA JUDGE.—Justice Stilwell H. Russell of the Oklahoma Supreme Court died suddenly at Oklahoma City on May 16. Judge Russell was 68 years of age, and was born in Brazoria county, Texas. Before removing to Oklahoma, he practiced law in Texas, and was at one time United States Marshal in that state. At the admission of Oklahoma as a state in 1907, Judge Russell was elected district judge of the Eighth judicial district, comprising Carter and Love counties, and was reëlected to that position which he held until March 15, 1914, when he was appointed by Governor Cruce as a member of the Supreme Court from the Second district to fill the vacancy made by the resignation of Justice R. L. Williams.

ARKANSAS BAR ASSOCIATION.—The seventeenth annual convention of the Arkansas Bar Association was held at Pine Bluff, Ark., on May 21 and 22. The subject of the address of the President, C. T. Coleman of Little Rock, was "Trial by Jury." Other addresses were as follows: "The Constitution—A Grant of Enumerated Powers," by James B. McDonough of Fort Smith; "Some Needed Reforms," by Lamar Williamson of Monticello; "An Arkansas City Under Commission Form of Government," by City Attorney E. P. Daily of Fort Smith; "Lord Cairns, Lord Chancellor of England," by Chief Justice E. A. McCulloch of the Arkansas Supreme Court. The following officers were elected: Judge Jacob Trieber of Little Rock, president; Ira D. Oglesby of Fort Smith, vice-president; Roscoe R. Lynn of Little Rock, secretary, and J. Merrick Moore of Little Rock, treasurer.

CHICAGO JUDGES ELECT OFFICERS.—The judges of the Circuit and the Superior courts of Chicago met in separate sessions on June 5 and elected officers for the year to take effect September 1. Judge John P. McGoorty was elected Chief Justice of the Circuit Court. Judge Merritt W. Pinckney was reassigned to the Juvenile Court. Judges Thomas G. Windes and Jesse A. Baldwin were elected Chancellors of the Circuit Court, Judge Baldwin was elected chief of the chancery division, and Judge Charles M. Walker was elected chief of the law division of the Circuit Court. An executive committee was chosen for the Circuit Court, as follows: Judges McGoorty, Baldwin and Walker. In the Superior Court Judge Denis E. Sullivan was elected head of the chancery division and member of the executive committee of that court. Judge Theodore Brentano was elected head of the law division and also member of the executive committee, of which Chief Justice Burke makes the third member. Judge Charles M. Foell was elected a chancellor and with Judge Sullivan, head of the chancery division, will constitute the chancery side of the Superior Court.

Other Deaths.—In addition to the recent deaths heretofore mentioned in this column, the following have been noted: May 1, at Seattle, Wash., William H. White, formerly United States district attorney and associate justice of the Supreme Court of Washington; May 6, at Hastings, Minn., William Hodgson, aged 67, judge of the First judicial district of Minnesota; May 10, at Newton, Ill., Henry M. Kassermann, county judge of Jasper county, Illinois; May 10, at New Albany, Ind., W. C. Utz, aged 54, judge of the Circuit Court of Indiana; May 11, at Vandalia, Ill., George T. Turner, formerly probate judge of Fayette county, Illinois; May 12, at Kansas City, Mo., Arthur Mason Allen, aged 83, former state senator of Missouri and at one time presiding judge of the Jackson County Court; May 12, at Clinton, Ill., George Ingham, county judge of DeWitt county, Illinois; May 15, at Montreal, Can., F. D. Monk, one of the leaders of the Montreal bar and former Minister of Public Works in the Dominion Cabinet formed by Borden; May 15, at Edna, Tex., Francis Wells, aged 69, formerly county judge of Jackson county, Texas; May 18, at Livingston, Tex., T. F. Meece, aged 74, former county judge of Polk county, Texas; May 19, at Carrolton, Ohio, James Holder, aged 70, formerly probate judge of Carroll county, Ohio; May 22, at British Guiana, Sir Thomas C. Rayner, aged 54, chief justice of the colony; May 25, at Greenville, Ill., Salmon A. Phelps, aged 96, formerly county judge of Bond county, Illinois; May 30, at Marysville, Kan., W. S. Glass, aged 60, former district judge and member of the Kansas state tax commission; May 30, at Indianapolis, Ind., John L. McMasters, judge of the superior court of Indiana.

English Notes.

Annuities for Retired Judges.—It is stated in the *London Gazette* that the king has granted annuities of £3500 for life to Sir R. L. B. Vaughan Williams, late one of the Lords Justices of Appeal, and to Sir A. M. Channell, late one of the justices of the High Court of Justice.

Law Reporting.—Certain observations that have been made recently by some members of the bench, anent a series of reports, draws attention to the fact that in England there are no "authorized" or "regular" reports of cases that have any monopoly or privilege for citation. As Lord Esher pointed out in 1889, the courts will accept "reports by barristers who put their names to their reports." The matter is thus tersely and accurately put in Lord Halsbury's Laws of England: "A barrister has the right of authenticating by his name the report of a case decided in any of the superior courts. As soon as a report is published of any case with the name of a barrister annexed to it, the report is accredited, and may be cited as an authority before any tribunal." Naturally notes of cases and reports in newspapers do not come under this category, and can be referred to only as interim information until the full reports with the barrister-reporter's name are issued. Quite apart from the actual authenticity or validity of any series of law reports, the value of the series or of any particular report must depend upon their individual factor.

English Bar Association Planned.—A movement is under way to organize in the British Empire a bar society modeled on the lines of the American Bar Association. Lord Haldane spoke before the American Bar Association at its last annual meeting, and it is believed the enthusiastic reports he brought back of the activities of the American organization hastened the determination to imitate it. British barristers have recognized that the English bar sorely needed some such organization, which would meet at intervals for the discussion of questions of the highest interests to the profession. It was deemed unworthy that a bar with such traditions should not enjoy the opportunities afforded by an organization like the American association. The Bar Council meets once a year for half an hour to adopt its annual report and pass votes of thanks, but this does not correspond with the great annual conventions of the American organization. The movement to organize begins with the bar of England, then the bars of the United Kingdom will be taken in, and ultimately it is planned to include the dominions and colonies. It is expected the definite proposals of the organizations will soon be submitted to the English bar.

Discoveries of Important Manuscripts.—The discovery of the reputed diary of the Black Prince recalls a find nearly a century since, quite as unexpected, and not less important, which was hailed with delight by the academic lawyers of the world—the discovery of the Institutes of Gaius in the Chapter House at Verona by Niebuhr, the Church historian. In the troubles of the Middle Ages the texts of the Institutes had been lost sight of. Some copies were, no doubt, ruthlessly destroyed, while others were cleaned of their writings and became palimpsest manuscripts of less important writers. In fact, Niebuhr's discovery was found below some work of St. Jerome. Up to ninety-eight years ago all that was known of the treatise of the great Sabinian jurist was an *abrégé* in the Bréviaire d'Alaric, and of this an unknown monk of the Middle Ages had made an epitome but "indifferent well." Justinian's commissioners, however, had preserved much of Gaius, and in the Pandects 535 references are to be found. The great find of Niebuhr was given to the world by Bekker, Goeschen, and Hollweg, who deciphered the Verona palimpsest, which, by the way, Niebuhr had come across while searching for material for his church history.

Defamatory Words in a Will.—Mr. Justice Bargrave Deane has decided in the recent case of In the Goods of Robert White (deceased) that nontestamentary defamatory words in a will will be ordered to be omitted from the probate copy. The first reported case of Curtis *v.* Curtis, in 1825 (3 Add. 33) was singularly like the present, the testator making libelous statements against his wife to account for leaving her out of the will. But the application in the earlier case was to strike out the clause from the will itself, and the court held it had no authority to do this on a mere motion. In 1846 the application took a different form in the case of Wastnaby (1 Rob. 423), and became one for omitting the libelous passages from the probate. Sir Jenner Fust refused at first, as he said there was no precedent, but subsequently he changed his opinion and ordered the omission of the passages. After this case the applications were always for omission from the probate copy, as in Marsh *v.* Marsh (1860, 1 Sw. & Tr. 528), where omission was allowed by the consent of parties. Lord Penzance, in the case of In the Goods of Honywood (1871, 2 P. & D. 251), seemed inclined to resist the growth of the custom. How could he order, he asked, any part of the will to be omitted from the probate, which declared itself to be a true copy? Yet, after the cases cited, he could not deny that he had the power, though he refused to exercise it. The expressions used by the testator were as clearly libelous as anything in the earlier cases, or in this before Mr. Justice Bargrave Deane; but Lord Penzance took

the view that they were only strong expressions of opinion. After In the Goods of Robert White (deceased), it may be taken that the judge will order nontestamentary expressions that appear to be to him libelous to be omitted from the probate.

CRUELTY TO ANIMALS.—To the credit of Ireland there is a flourishing society in that country devoted to the resistance of cruelty to animals. The annual meeting was held recently, and among the speakers was the Lord Chief Justice of Ireland, whose devotion to the cause is well known. His Lordship made sympathetic allusion to three bills before Parliament this session, the exportation of horses bill, the plumage bill, and the bill to prevent the vivisection of dogs, admitting that there was a good deal of controversy about the latter measure. The society has agents all over the country who look after cases of cruelty to animals and commence prosecutions, and it also exercises a useful influence in assisting to have legislation passed with the object of lessening the cruelties which may now be carried on within the law, a very useful form of activity. It may be of interest to record in this connection that it was an Irishman, Richard Martin, better known as "Humanity Dick," who succeeded in carrying into law the first modern act of Parliament on the subject of cruelty to animals. It was entitled "An Act to prevent the cruel and improper treatment of cattle," and it received the royal assent on the 22nd July 1822. It was amended by subsequent statutes passed in 1835 and 1849. In 1824 Martin founded the Royal Society for the Prevention of Cruelty to Animals, and after the passing of his own act, and while living in London, he prosecuted himself before the magistrates every case which he thought came within its provisions. Martin was a very remarkable man, full of humor, courage, and recklessness. He fought many duels with Fighting Fitzgerald and Stowell, and he fought some Parliamentary contests which were in those days in themselves a prolonged duel. An account of these activities will be found in Sir Jonah Barrington's Personal Sketches. In county Galway, which he represented in the House of Commons for nearly ten years, he was very popular. King George IV. was his warm friend, and it is recorded in his biography that the Sovereign asked him prior to the General Election of 1820 who was going to win in Galway. "The survivor, sire," was Martin's ready reply. He died in 1834.

WHAT IS AN "ACCOMPLICE"?—A recent case, involving the consideration of the legal meaning of the word "accomplice," is of considerable interest and of great practical importance to legal practitioners. As will be remembered, it was formerly a general rule of evidence in civil cases not to admit the evidence of a witness who was necessarily to be a gainer or loser by the event of a cause, although this disability was removed in 1843 by the Evidence Act. In criminal cases, such a person was always a competent witness both before the grand jury and at the trial (Rex *v.* Dodd, 1 Leach 155), and this whether he was included in the indictment or not (Reg. *v.* Tinckler, 1 East P. C. 356). At the same time, in criminal cases, there has for centuries existed a rule that the evidence of an accomplice, uncorroborated in some material particular, should not be acted upon as sufficient to establish the case of the prosecution: Rex. *v.* Atwood, 1 Leach 464. This, as was pointed out in Rex *v.* Tate, 99 L. T. Rep. 620, was a rule originally of practice rather than of law, but of such universal acceptation that it should always be acted upon. Under section 7 of the Criminal Law Amendment Act 1912 and section 1 of the Vagrancy Act 1898 a man was tried for an offense involving living on the earnings of a prostitute. The evidence for the Crown was that of the woman herself, and the Court of Criminal Appeal held that such evidence was sufficient without corroboration as she was not an "accomplice" within the rule. The rule has never been extended beyond the case of principals or accessories to the crime charged in the indictment, and of course, in the case of the charge in question, the woman was not within this category. The court, however, suggested that even in such a case it was desirable, if not necessary, that the judge presiding at the trial should caution the jury as to the danger of acting upon such evidence in the absence of corroboration. With this suggestion no one experienced in the administration of our criminal law will disagree, as the evidence of a prostitute, although the victim, as a rule, of the person charged with living upon her earnings, is evidence of a nature such as the courts are wont to look upon with some degree of suspicion.

DEPENDENCY OF WORKMAN'S POSTHUMOUS BASTARD.—Where a workman, being the parent or grandparent of an illegitimate child, leaves such a child dependent upon the earnings of the workman at the time of his death caused by accident arising out of and in the course of his employment, such illegitimate child is included in the definition of "dependents" contained in sect. 13 of the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58). And in Orell Colliery Co. Ltd. v. Schofield, 100 L. T. Rep. 786, (1909) A. C. 433, it was held by the House of Lords that an illegitimate child, even though posthumous, would come within the statutory definition. That decision was completely in harmony with what was decided by the Court of Appeal in Williams *v.* Ocean Coal Company, Ltd., 57 L. T. Rep. 150; (1907) 2 K. B. 422. A posthumous legitimate child of a deceased workman was there held to be a "dependent," having regard to the decision of the House of Lords in Villar v. Gilbey, 96 L. T. Rep. 511, (1907) A. C. 139, in respect of a child *en ventre sa mere.* According to a subsequent decision, however, of the same tribunal, dependency is a question of fact to be proved by evidence, and not to be presumed in law. That is to say, there is no legal presumption in favor of dependency: New Monckton Collieries *v.* Keeling, 105 L. T. Rep. 337; (1911) A. C. 648; see, further, Potts or Young *v.* Niddrie & Benhar Coal Co. Ltd, 109 L. T. Rep. 568; (1913) A. C. 531. What had, therefore, to be ascertained in the recent case of Lloyd *v.* Powell Duffryn Steam Coal Co., Ltd., was whether there was evidence to prove that the workman in that case had shown an intention to take upon himself the duty of maintaining his illegitimate child when born, his impending paternity having been acknowledged by the workman. But on the case coming on to be heard before the Court of Appeal last year, it was decided that evidence was inadmissible to establish that the workman had made statements to the effect that he did not mean to evade that obligation, but had resolved to marry the mother of the child. The reason for the rejection of the evidence was that none of the statements alleged to have been made by the workman was against his interest. The House of Lords, however, have held that the decision of the Court of Appeal was wrong, and that the evidence in question was rightly found to be admissible by the learned county court judge. His Honor had regarded the condition of the evidence being against interest as satisfied, contrary to the view entertained by the Court of Appeal. In the House of Lords, Lord Loreburn, who delivered the leading opinion, rested the same on the following ground: The evidence in question went to show that if the workman had not prematurely died, the child would have been born legitimate. His Lordship, of course, in that assertion meant to include this: If the father had carried into effect his promise to marry the mother of the child. If born legitimate, the father would have been legally bound to maintain the child. That was a strong

fact to prove dependency; and, therefore, evidence was admissible for that purpose. Lord Atkinson delivered an opinion to the same effect, with which Lord Moulton agreed. But Lord Shaw concurred on a somewhat different ground. He considered that the definition of "dependents" included all children of a deceased workman, whether legitimate or illegitimate, within the category of possible dependents. As this view entirely ignores the previous decisions of the House of Lords as to dependency being a question of fact in each case, no weight can be attached thereto. The decision of the majority of the learned Lords as to evidence being admissible to prove the dependency of the posthumous bastard of a workman was the only one possible in the circumstances.

Obiter Dicta.

SOMEBODY HAD TO.—Settle *v.* Settle, 141 N. Car. 553.

CLOSE TO DEATH'S DOOR.—Jordan *v.* Neer, 34 Okla. 400.

TAKING NO CHANCES.—Guard *v.* Risk, 11 Ind. 156; Watchman *v.* Crook, 5 G. & J. (Md.) 239.

SMALL SACKS?—In Commonwealth *v.* Sacks, 214 Mass. 1019, the defendant was convicted of giving short weight in selling grapes.

BEAUTY AND THE BEAST.—"Plaintiff, forty-two years old and no doubt comely, sued defendant, seventy-six years old and well-to-do, for forty thousand dollars damages because he did not keep his promise to marry her."—Per Robinson, J., in Kendall *v.* Dunn, 71 W. Va. 263.

DEGREES OF INTOXICATION.—In Davis *v.* State, 9 Ga. App. 434, the court judicially recognizes the well-known fact that there are various stages of intoxication. Some of the following stages, however, may be new to the average person: "We think that the light shed upon the transaction by this testimony as to what he did at other places about the time when he appeared on the highway showed, not only that he was drinking somewhat, but that he was 'gloriously and hilariously' drunk, and, what is more important, that he was 'cussingly and fightingly drunk.'"

A SOUTHERN RHAPSODY.—"Some question is raised as to whether the watermelon is a fruit or a vegetable. We think that it is both. Generically it is included within the genus vegetable, and still it is a species of fruit. But it is immaterial how this the most luscious product of the Southern field, which is a joy to the Northern millionaire and at the same time affords full and serene satisfaction to 'Uncle Sambo' and his brood of pickaninnies, a crop which not only draws a stream of gold from outside markets but tickles the palates of all who eat it as nothing else can, is denominated."—See Massey *v.* Columbus, 9 Ga. App. 10.

A PREMONITION.—Judge Bleckley of the Supreme Court of Georgia, in an opinion written thirty-five years ago, made the following caustic comment on the attitude of a woman towards her husband: "Mrs. Rose Taylor testified as a witness in behalf of the state, and it is evident from the tenor and tone of her testimony that she considers her husband as a member of her family, and herself as the head of the establishment. The true legal relation of husband and wife is in her mind reversed. Metaphorically speaking, she puts the petticoat in a more advanced position than the pantaloons." See Morgan *v.* State, 63 Ga. 307. Whether the wise old jurist intended to herald a warning of subsequent events we cannot say; but what would he write to-day?

NOT UNFAIR COMPETITION.—Simplex Automobile Co. *v.* Kahnweiler et al., 147 N. Y. Supp. 617, was an action brought to enjoin the defendants, on the ground of unfair competition, from using the word "Simplex" as a designation of the fire extinguisher manufactured by them. Said Mr. Justice Clarke of the Appellate Division: "It requires a stretch of the imagination beyond the breaking point to conceive of a purchaser intending to buy one of plaintiff's motor cars being so deceived by defendant's use of this device as to buy one of its fire extinguishers instead. It is almost a trade classic for a clerk in a dry goods or druggist's shop, when out of a particular article asked for, to tender 'something equally as good'; but even the most expert seller of Yankee notions would scarcely venture to substitute a fire extinguisher for an automobile." The learned justice might well have added that the slight difference in price between the two articles mentioned would doubtless have some little bearing on the possibility of deception.

BY WAY OF ILLUSTRATION.—In Maril *v.* Connecticut Fire Ins. Co., 95 Ga. 612, an action on a fire insurance policy, Judge Atkinson drove home his argument in the following manner: "A rule which permitted the printed conditions to control the written statement of the subject upon which the insurance was issued, would place the insurance company in the peculiar condition of saying, in effect, 'I issue this policy; I accept your money in satisfaction of my demand for premiums; I insure your property to be used in your business, but if you use it, your policy is void.' A parallel case, and one which alone adequately expresses the peculiar paradox in the case supposed, is to be found in the sage advice given to her youthful daughter when an affectionate but over-cautious mother, in reply to the simple request:

'Mamma, may I go out to swim?'

said to her:

'Yes, my darling daughter;
Hang your clothes on a hickory limb,
But don't go near the water.'"

A GHOSTLY GAME.—"For four men to leave their business in the daytime and go to a cemetery and play cards on the headboard of a grave would seem to indicate that there was something more in the way of temptation than the mere pleasure of playing an innocent game of cards, and in view of the indicia of the presence of intoxicants, and the evidence that a beverage of this character was hard to get in Hancock county and was very valuable, it would seem to be not unreasonable to infer that the 'drinks' furnished the inducement for the playing of the game, and it is difficult to believe, in view of the evidence as to the great value of whisky in Hancock county, that the generosity of one of the players would have furnished without price the tempting stake. It is so natural for men who

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play cards, and for those who drink, to play for drinks, that this court is constrained to the conclusion that the verdict of the jury was not wholly unauthorized. Apparently the law against gaming, as well as against the sale of liquor, is most vigorously enforced in Hancock county and in the town of Sparta, when the citizens of the town are compelled to resort to a cemetery to play cards for drinks, and when, even in that secluded spot, they don't have a ghost of a chance." See Twilley *v.* State, 9 Ga. App. 436.

JUDGE LAMM IN HIS OWN DEFENSE.—Have some captious persons been criticising Judge Lamm of Missouri for his frequent excursions into the realms of poetry, history, literature, and what not? Note what he says in Honea *v.* St. Louis, etc., R. Co., 245 Mo. 641: "Thus undeservedly afflicted with troubles and tribulations, plaintiff 'plucked the flower safety, from the nettle danger,' and then—lost it. This, it is said, on one of her own instructions. So, her case (we borrow Moore's figure):

> That stood the storms when waves were rough,
> Yet in a sunny hour fell off
> Like ships that have gone down at sea
> When heaven was all tranquillity.

(*Nota bene*, by way of a sidestep: There be those who say that poetry has no place at all in jurisprudence or legal exposition. *Quoad hoc*, it may be said, the French have a saw, 'He who excuses himself accuses himself.' Not caring to fall foul of that adage, we enter no excuse, but point to the venerable dictum of the mentor and master, Sir Edward Coke (Co. Litt. 264): 'The opinions of philosophers, physicians and poets are to be received and alleged in causes.' *Quod erat demonstrandum.*)"

AUTOPTIC PROFERENCE.—In Morse *v.* State, 10 Ga. App. 61, the Georgia Court of Appeals held that it was all right for the trial judge to charge the jury that "evidence may be autoptic proference." Respectfully but firmly we protest. The jury may have seen with their eyes but certainly not with their minds. However, the following remarks of the appellate court are interesting to say the least: "Error is assigned as to this charge on two grounds: (1) that the statement is abstractly incorrect; and (2) that it is misleading. Considering these points in reverse order, we may say (to borrow a Hibernicism from the private vocabulary of an ex-Justice of the Supreme Court of this State) that the language excepted to is neither leading nor misleading. As to the other objection—that the language is abstractly incorrect—if incorrectness from a legal standpoint is intended, the objection may be disposed of by citing Wigmore on Evidence, §1150 et seq. If philological incorrectness is referred to, the objection is more tenable; for, while 'autoptic' is a good word, with a pride of ancestry, though perhaps without hope of posterity, the word 'proference' is a glossological illegitimate, a neological love-child, of which a great law writer confesses himself to be the father (see Wigmore on Evidence, §1150, note 1). Despite all this, we cannot brand the statement as reversible error. This court is rather liberal in allowing the judges on the trial bench the privilege of big words."

THE TRIUMPH OF LAW AND JUSTICE.—Says the Fort Collins (Col.) *Express:* "That Wright was wrong and that they had not been treated right, was the contention of Law & Justice in a suit tried before a jury in Judge Leighter's court Wednesday, and it is now officially recorded on the records of that court that Wright was wrong and that Law & Justice were right. Now it was not just because Judge Leighter is a firm believer in law and justice and that the jurors believed they were right, but because law and justice and the right were on the side of Law & Justice, and both judge and jury thought it was only right to see that Wright as well as Law & Justice were treated right, therefore the returning of the verdict against Wright was favorable to Law & Justice. Had Wright been right, Law & Justice would have received law and justice just the same, as both judge and jury believe that right is right and harms no one, and that law and justice should prevail, but as in their minds it was plainly a case of Law & Justice being right and of Wright being wrong, Wright must grant law and justice to Law & Justice, and do right by them. Wright may prevail but not over Law & Justice.

"Now while courts are to administer law and justice, it was necessary yesterday that Law & Justice show that they were right. Wright insisted that he also wanted law and justice and that he had been right, but Law & Justice insisted that they were right and that in order that they be given law and justice Wright must do right by them.

"Now it seems that Mr. Law and Mr. Justice, who are well drillers, had drilled a well for Mr. Wright, but owing to a dispute as to the terms of their contract, Mr. Wright had refused to pay them for their work. They sued, and were yesterday awarded a verdict of $100.40."

A POETICAL DEBATE.—Ritter *v.* Couch, 71 W. Va. 221, was an action brought to set aside the sale of a burial lot by the city of Charleston and to enjoin the removal therefrom of the graves of the plaintiff's relatives. Judge Brannon, writing the prevailing opinion in favor of the plaintiffs, said in part: "The act of the city in selling this lot to Couch cannot be justified on the ground that the lot was a public nuisance. There is no evidence of this, and it is to be remembered that the city never declared it to be a nuisance, or ordered or forbade its use for burial, or ordered disinterment of the bodies therein. That a cemetery per se is not a nuisance is supported by many authorities. . . . The briers and weeds grew up in it. What of that? The blackberry's flower is as sweet to the dead as any. The weed, though so called, spreads 'its perfume on the desert air.' They too are nature's tributes to the dead.

> 'Above the graves the blackberry hung
> In bloom and green its wreath,
> And harebells swung as if they sung
> The chimes of peace beneath.'

So sings Whittier in 'The Old Burial Ground.'"

Judge Williams, however, dissented, and not to be outdone in the mere matter of quoting poetry, came right back at his colleague in this fashion: "What means the language found in the burial rite of all Christian denominations, 'earth to earth, dust to dust, ashes to ashes,' if the body is to be forever preserved? And if it is not to be forever preserved, why then should the spot of ground in which it rests be forever hallowed, and withheld from occupation; and, if not withheld forever, then how long? Thomas Campbell is just as eminent authority, in law, as our own beloved Whittier; and from him I quote the following:

> 'What's hallowed ground? Has earth a clod
> Its Maker meant not should be trod
> By man, the image of his God,
> Erect and free,
> Unscourged by Superstition's rod
> To bow the knee?'"

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Law Notes

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Monastic Vows.

AN interesting decision was recently handed down by the United States Supreme Court to the effect that a vow of poverty, taken by a member of a religious order, is binding, so long as the person who has taken the vow remains willingly a member of the order. It appears that Father Wirth, a Benedictine monk in Kansas, took the vow of poverty, binding himself to turn over all his possessions to his order. Nevertheless, by the favor of his superior, he was permitted to retain a certain personal estate, chiefly derived from the copyright on books he had written. When he died, both the Benedictine order and his relatives claimed his property; and the Kansas courts gave it to his relatives, on the ground that vows of poverty and of renunciation of property are against public policy and therefore void. This ruling the Supreme Court overthrows, giving the property to the Benedictines on the strength of the vow. We have seen no other case that presents the precise point here passed upon, but the principle underlying the decision is the same as that which upholds agreements to transfer property in consideration of maintenance. Thus it has been held that a condition of admission into an institution that the applicant should transfer to the institution all property or income of any kind that he might have is not against public policy, *General German Aged People's Home* v. *Hammerbacker,* 64 Md. 595, 3 Atl. 678, 54 Am. Rep. 782; although a different rule appears to prevail as to agreements to transfer future-acquired property. *Baltimore Humane Impartial Soc.,* etc., v. *Pierce,* 100 Md. 520, 60 Atl. 277, 70 L.R.A. 485. In the case last cited, however, the court strongly intimated that contracts were not to be lightly stricken down on the ground that they are contrary to what is called "public policy." "That," said the court, "is an uncertain, indefinite term, and when judges come to apply the doctrine they must take care that they do not trespass upon the right to make contracts as parties see proper, so long as they do not violate some principle or policy of law."

In Father Wirth's case there was not only the consideration of maintenance to validate his agreement with the monastery, but the vow of poverty was of a religious nature, and consequently was properly exempt from public interference. Nor is it clear what public policy would be served by diverting property thus dedicated by the owner to religious and charitable uses and distributing it among relatives whom he had in effect disinherited by his own act of renunciation. It has been well said that "Heaven sends us our relatives, but we may choose our friends." Father Wirth chose his friends and made them the beneficiaries of his bounty. Wisely, it seems, our highest tribunal holds his choice inviolate.

Night Labor in Factories.

THE Appellate Division of the New York Supreme Court has held constitutional the provision of the State Labor Law, prohibiting the employment of women and girls in factories between the hours of 10 P.M. and 6 A.M. The law was attacked on the ground that it violated the due process of law clause of the Constitution. Justice Ingraham, writing the prevailing opinion of the court, took the ground that the main intent of the law was to preserve the health of women and aid them in their maternal functions. "The law," said Justice Ingraham, "recognizes a distinction between the sexes and justifies legislative enactment for the protection of the morals of women which have not been and are not now considered necessary in the case of men.

"Upon the health of women, as the child-bearing sex, necessarily depends the future health of the succeeding generations. Any occupation that tends to lower the vitality of woman and interferes with her bearing healthy children directly impairs the health and capacity of future generations and is a subject of the utmost concern."

The most pronounced opposition to this law comes, not unnaturally, from the working women themselves, who claim, and not unreasonably, that their right to work at any and all times when it seems desirable or necessary should not be curtailed. There can be no doubt that a rigid enforcement of the law will work great hardship in the large centres where thousands of women are employed at night in the various factories. Most of these women must work at night or not work at all, and the prohibitory law cannot be other than a direct attack upon their means of sustenance. In theory the law may be a praiseworthy one, but it is a condition and not a theory that confronts these working women. Most women, too, we fancy, will resent the implications contained in the law. In the matters pertaining peculiarly to their sex they will insist upon making their own conditions, instead of having conditions imposed upon them by the opposite sex. It only remains to say that the constitutionality of the law was upheld by a divided court, which fact raises a doubt as to its ultimate fate when it reaches the Court of Appeals.

Christian Science Healing.

BY a divided court the Appellate Division of the Supreme Court of New York recently affirmed the conviction of Willis Vernon Cole, a Christian Science

healer, for practicing medicine without a license. It appeared that Mr. Cole had offices in the city of New York where he received his patients, and that while he did not make any definite charge for his services, taking, he said, what his patients offered him, he had an average income from his practice of six thousand dollars a year. Mr. Cole contended that in convicting him the courts were interfering with him in the practice of the tenets of his religious belief. Answering this contention, Justice Clarke, who wrote the prevailing opinion, made it clear that the court did not assume nor had it the power to assume the function of curtailing a man in the practice of his religious beliefs. The commercialized use of prayer, however, for the avowed purpose of treating all persons seeking cure for all kinds of bodily ills, was not, Justice Clarke said, the practice of the religious tenets of a church. The prevailing opinion did not pass on the question of whether Mr. Cole could have lawfully treated patients in their own homes or in a Christian Science church. Justice Laughlin, while concurring with Justice Clarke in the instant case, was of the opinion that if Mr. Cole had given the treatment complained of in a Christian Science church to members of the church it would not have been a violation of the law. Justice Dowling dissented from the majority ruling of the court. In announcing that an appeal would be taken from the decision of the Appellate Division, the Christian Science Committee on Publication for the State of New York issued a statement by Clifford P. Smith of the Committee on Publication for the Mother Church in Boston.

In part it follows: "Christian Science is the restoration of original Christianity with its healing power. In principle and practice it is the same; even though Christian Scientists have not become perfect in its practice. Even as now practiced, however, it is the most effective and reliable curative agent known to mankind. Christian Science is not only comparatively safe, but it tends to develop the higher nature and to unfold the qualities which will enable the human race to put off its mortality. The attitude of Christian Scientists toward compensation is that which was authorized by Christ Jesus. He who said: 'I must be about my Father's business,' also said, 'the laborer is worthy of his hire,' and he said this to his disciples when sending them forth to preach the gospel and heal the sick. The practice of Christian Science is not the same as the practice of medicine, and it cannot be made the same by law. The public will have the right to employ the most effective aids. The great mass of people have respect for their neighbor's faith in God; they despise injustice disguised as law; they dislike monopoly; they favor equal rights absolutely; they value the right to choose for themselves. The only law on this subject which the people need or want is a plain or simple law which would forbid a man to hold himself out to the public as a medical doctor or surgeon, or to accept employment as such, without having the education or training appropriate to that profession. Any law which goes farther than this must be based on the claim that the people do not possess sufficient intelligence to choose for themselves."

Release Clause in Baseball Contracts.

The much discussed ten-day notice of release clause in baseball contracts which has been animadverted on in a number of cases and which in *Metropolitan Exhibition Co.* v. *Ward,* 24 Abb. N. C. (N. Y.) 393, and *Philadelphia Ball Club, Ltd.* v. *Hallman,* 8 Pa. Co. Ct. 571, was held to be so harsh and inequitable that a court of equity would not lend its aid in the enforcement of a contract containing it, has now been upheld as valid by the Superior Court at Chicago, in the case of *Cincinnati Exhibition Co.* v. *Johnson.* The decision was made on a motion to dissolve a temporary injunction issued in the case restraining the defendant from giving his services as a baseball player to any person, firm or corporation other than the complainant, in violation of his contract. One of the points urged by the defense was that the provision in the contract authorizing the complainant to discharge the defendant on giving ten days' notice, was so harsh, unfair and unconscionable as to render the negative covenant of the contract unenforceable by injunction. The provision of the contract relating to discharge (section seven) was as follows: "The club may, at any time, after the beginning or prior to the completion of the period of said contract, give the player ten days' written notice to end and determine all its liabilities and obligations hereunder, in which event the liabilities and obligations undertaken by the club shall cease and determine at the expiration of said ten days. The player, at the expiration of said ten days, shall be freed and discharged from all obligations to render service to the club. . . ." In upholding this clause of the contract the court said: "Second. Is the contract void because of section seven? In *Poe* v. *Ulrey,* 233 Ill. 56, a bill was filed to set aside an oil and gas lease, for the reason, inter alia, that it was void because of a provision which gave the lessee the right, at any time, upon the payment of one dollar to the lessors, to terminate the lease, there being no reciprocal right of termination in the lessors. The court sustained the validity of the contract, saying on page 64: 'Such options and contracts are not invalid in the law. . . . .' In *Philadelphia Ball Club, Ltd.* v. *LaJoie,* 202 Pa. St. 210, an injunction was obtained to enjoin the defendant, a ball player, from playing with another club. The contract there involved contained a clause giving the club the right to terminate the contract on ten days' notice. The court says on page 222: 'Upon a careful consideration of the whole case, we are of opinion that the provisions of the contract are reasonable. . . .' In *Hoyt* v. *Fuller,* 19 N. Y. Supp. 962, a contract for the exclusive services of an actress, with a provision that the employer might terminate it at any time, was held to be 'fair' and was sustained. In *McCall* v. *Wright,* 31 L. R. A. (N. S.) 249 (New York Court of Appeals), a contract of employment which gave the employer the right to terminate the agreement at any time on giving to the employee thirty days' notice, was sustained. In *Singer Sewing Machine Co.* v. *Union Button Hole & Embroidery Co.,* 22 Fed. Cases 220, it was held that a provision in a contract that, in effect, gave the complainant the right to renounce it at any time did not render the contract invalid. The testimony in this case shows that, with few exceptions, section seven in the contract here in question is substantially the same as that contained in practically every baseball contract entered into between players and the principal clubs of the country during the last twenty years or more. It seems improbable that the many members constituting the great fraternity of baseball players should have, for a score or more years, voluntarily in contemplation of law signed such contracts if the practical effect of a clause, such as said section seven, resulted in the infliction of an uncon-

scionable hardship upon the players. Under the evidence in this case, and the rule laid down in foregoing authorities, the court is of the opinion that the contract in question here is not void because of section seven thereof."

The ten-day notice of release clause has heretofore been considered to be one of the weak points in baseball contracts. A number of players have deserted organized baseball in violation of their contracts, on the theory that the ten-day as well as the "reserve" clause made the contracts unenforceable. In most, if not all, of the new baseball contracts unfavorable litigation has been forestalled by the insertion of a new reserve clause and by expunging the ten-day clause. Many of the players, however, are serving under hold-over contracts containing the ten-day clause, and, of course, in such cases the Chicago decision will place a restraint upon desertions from organized baseball based upon the supposed weakness of that clause.

Negative Covenant in Baseball Contracts.

IN *Cincinnati Exhibition Co.* v. *Johnson,* supra, the court, in addition to sustaining the ten-day notice of release clause in baseball contracts, holds that a covenant in such a contract, that the player agrees to play for the club, and for no other party during the contract, is valid, and that where it is made to appear that the services of the player are of such a peculiar character that the club cannot procure another player to render services of like character, the club is entitled to the enforcement by injunction of the negative covenant. Such a case, the court holds, is not governed by the rule that a suit to enjoin the violation of a contract is governed by the same rules as a suit to enforce specific performance; and while specific performance of the contract could not be decreed, the violation of the express negative covenant could be enjoined. Upon this branch of the case the court says in conclusion: "In the judgment of the court, this case is one falling within that class described by Judge Holmes in *Singer Sewing Machine Co.* v. *Union Button Hole, etc., Co.,* 22 Fed. Cases, at page 22, in the following language: 'If the case is one in which the negative remedy by injunction will do substantial justice between the parties, by obliging the defendant either to carry out the contract, or lose the benefit of the breach, and the remedy at law is inadequate and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it.' The fundamental law of this state provides that 'Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation. . . .' The rights accruing to the complainant under the contract here in question are property within the plain meaning of the law, and if the contract is a valid one, as we think it is, the defendant should not be permitted to repudiate it to the damage of the complainant, if that can legally be prevented, and to his own advantage. In this connection the language of Mr. Justice Cartwright in *Poe* v. *Ulery,* 233 Ill., at page 63, is peculiarly applicable. 'So far as the charge that the contract was harsh and unjust is concerned, it may be said that the parties were competent to contract with each other, and neither side can be relieved from their agreements on the ground that they did not use good business judgment in entering into the contract. . . . Where parties who are competent in the law and in fact to enter into contracts, fully and voluntarily contract with each other, it is of the utmost importance to them, and to the public as well, that their agreement shall be respected and enforced by the courts, and that neither shall be relieved from the obligation of his contract, except upon some certain ground deemed valid by the law.' It is neither the function of courts to make contracts for parties, nor to alter them when they have fairly been entered into, but rather to enforce them, if valid, when called upon to do so in cases properly submitted to them. The contract here in question is, in the judgment of this court, a valid obligation, and while the defendant cannot be compelled to specifically render to complainant the services contracted for, he should, nevertheless, be enjoined from transferring the same to another or rival baseball club so long as complainant fulfills its own obligation thereunder. The motion to dissolve the temporary injunction heretofore entered is therefore denied."

We suspect that Judge Foell, who writes the opinion in the above case, is a high-degree baseball fan, for he attaches sufficient importance to the question before him to go into an exhaustive consideration of the authorities bearing thereon. All lovers of baseball will be glad that his thorough investigation of the subject has led him to conclusions that make for the honor and integrity of the national game.

Asexualization Statutes.

THE United States District Court at Keokuk, Ia., recently declared unconstitutional the Iowa vasectomy law passed by the last general assembly, and granted a writ of injunction to an inmate of the state penitentiary, restraining the members of the board of control from causing an operation to be performed on him as a twice convicted felon. In the January issue of LAW NOTES the constitutionality of asexualization statutes was discussed, and attention was called to two recent decisions upon the subject. In one of these, *State* v. *Feilen,* 70 Wash. 65, 126 Pac. 75, it was held that the operation of vasectomy for the prevention of procreation, as authorized by the Washington statute to be performed upon rapists and upon habitual criminals, was not "cruel punishment" within the inhibition of the constitution when applied to one guilty of the crime of carnal abuse of a female child under the age of ten years. There is no necessary conflict between this holding and the decision by the federal court at Keokuk. The Washington statute (Rem. & Bal. Code, § 2287), upon which the decision in *State* v. *Feilen,* supra, was based, provides that: "Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be an habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation." It will be seen that this statute is permissive as to the imposition of the additional physical punishment. Its imposition in the instant case was held not to be "cruel punishment" within the constitutional inhibition, since the defendant had been found guilty of the first offense mentioned in the statute—a brutal, heinous, and revolting crime, and one for which, if the legislature so

determined, the death penalty might be inflicted without infringement of any constitutional prohibition. It does not follow that the Washington court sanctions or would have sanctioned the physical penalty of the statute in the case of an habitual criminal. In any case the ruling of the federal court at Keokuk has interposed barriers against such an exercise of the penal power of the state. In a recent New Jersey case the court animadverts upon this kind of legislation, although an epileptic, and not a criminal, was the subject of the intended operation. This was the case of *Smith v. Board of Examiners of Feeble-Minded*, (N. J.) 88 Atl. 963, wherein it appeared that the Board of Examiners, created by an act authorizing the sterilization of feeble-minded, epileptics, and certain criminals (P. L. 1911, p. 353), ordered that the operation of salpingectomy be performed upon an epileptic inmate of a state charitable institution, as the most effective operation for the prevention of procreation. The court held that the statute in question was based upon a classification that bore no reasonable relation to the object of such police regulation—and hence denied to the individuals of the class so selected the equal protection of the laws guaranteed by the fourteenth amendment to the Constitution of the United States. The defendants sought to have the statute upheld as a proper exercise of the police power of the state. Upon this branch of the case the court, speaking through Justice Garrison, said: "This power, stated as broadly as the argument in support of the order requires, is the exercise by the legislature of a state of its inherent sovereignty to enact and enforce whatever regulations are in its judgment demanded for the welfare of society at large in order to secure or to guard its order, safety, health, or morals. The general limitation of such power to which the prosecutrix must appeal is that under our system of government the artificial enhancement of the public welfare by the forcible suppression of the constitutional rights of the individual is inadmissible. Somewhere between these two fundamental propositions the exercise of the police power in the present case must fall, and its assignment to the former rather than to the latter involves consequences of the greatest magnitude. For while the case in hand raises the very important and novel question whether it is one of the attributes of government to essay the theoretical improvement of society by destroying the function of procreation in certain of its members who are not malefactors against its laws, it is evident that the decision of that question carries with it certain logical consequences, having far-reaching results. For the feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the legislature, be a distinct benefit to society. If the enforced sterility of this class be a legitimate exercise of governmental power, a wide field of legislative activity and duty is thrown open to which it would be difficult to assign a legal limit. If in the present case we decide that such a power exists in the case of epileptics, the doctrine we shall have enunciated cannot stop there. For epilepsy is not the only disease by which the welfare of society at large is injuriously affected; indeed, not being communicable by contagion or otherwise, it lacks some of the gravest dangers that attend upon such diseases as pulmonary consumption or communicable syphilis. So that it would seem to be a logical necessity that, if the legislature may, under the police power, theoretically benefit the next generation by the sterilization of the epileptics of this, it both may and should pursue the like course with respect to the other diseases mentioned, with the additional gain to society thereby arising from the protection of the present generation from contagion or contamination. Even when these and many other diseases that might be named have been included, the limits of logical necessity have by no means been reached. There are other things besides physical or mental diseases that may render persons undesirable citizens, or might do so in the opinion of a majority of a prevailing legislature. Racial differences, for instance, might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue. Even beyond all such considerations it might be logically consistent to bring the philosophic theory of Malthus to bear upon the police power to the end that the tendency of population to outgrow its means of subsistence should be counteracted by surgical interference of the sort we are now considering. Evidently the large and underlying question is, How far is government constitutionally justified in the theoretical betterment of society by means of the surgical sterilization of certain of its unoffending but undesirable members? If some, but by no means all, of these illustrations are fanciful, they still serve their purpose of indicating why we place the decision of the present case upon a ground that has no such logical results or untoward consequences."

Smoking in Court.

A Denver judge has established a precedent that is not likely to be generally followed, although it is not without some points of merit. Soon after court opened one morning, observing that there were no ladies present, he lighted a cigar and invited all smokers in the court room to do the same. They were not slow to follow his example, and it was not long before the judge's bench, the attorneys' table and the benches outside the bar were enveloped in clouds of blue smoke. Scandalous and undignified! you say. Well, we are not so sure about that. The genial comradery of the judge who opens court with a cheery "Let's all smoke up" is certainly more grateful than the frigid aloofness that usually invests the occupant of the bench. A good cigar might, at times, be no inconsiderable aid in the administration of real justice. Who has not marked the occasional morning testiness of his honor—his abruptness with attorneys and witnesses, his hasty and ill-tempered rulings, and the severity of the sentences he imposes upon the hapless human derelicts who come before him? May not all this be due to the fact that he has had to hurry to court without his morning smoke and is there denied the solace of his fragrant Havana? If smoking were permitted in court there would, without a doubt, be less bickering at the attorneys' table, for under the mollifying influence of the weed attorneys would be less petulant and contentious. And they would be more ready, too, to extend to opposing counsel those little amenities of the court room which make for the smooth and orderly administration of justice. When the lawyers fall to arguing abstruse questions relating to contingent remainders or rights of way the occupants of the benches outside the bar would find a cigar a most com-

forting recourse and its mild stimulus would invest even those recondite subjects with a measure of interest. Of course, the rare privilege of smoking in court would have to be hedged about with certain restrictions. The pipe and cigarette would be tabu, as would also those cheap outputs of the factories which masquerade under the name of cigars and do but profane the sacred leaf. A standard of quality would have to be established, perhaps an official cigar determined upon, so that the delicious aroma from the curling smoke would suggest the burning of incense in the temple of justice rather than a desecration of those sacred precincts.

A Model Wife.

A pretty bride of twenty years recently came into a New York City Court to withdraw a charge of assault which she had lodged against her husband. "My husband spanked me," she admitted, "but I had disobeyed him and he did right to punish me." "So you think he had a right to punish you if you disobeyed him?" asked the judge. "Yes, I do," the young woman replied. "I think every wife should obey her husband." O most exemplary spouse! In these parlous times of suffragists and suffragettes—times of an assertive and insistent feminism that threatens an ultimate gynocracy—how refreshing and reassuring to our sterner sex is an incident such as this, harking back, as it does, to the basic principles of sex relationship!

THE FEDERAL EMPLOYERS' LIABILITY ACT

The Supreme Court of the United States in the recent case of *Illinois Central R. Co.* v. *Behrens,* 34 Sup. Ct. Rep. 646, has not only greatly limited the scope of the federal employers' liability act but has, it is to be feared, interposed a serious practical obstacle to its enforcement in a class of cases within its admitted purview.

In that case it appeared that the plaintiff's decedent was a fireman engaged on a switching engine in a railroad yard where cars, used indiscriminately in interstate and intrastate commerce, were loaded, unloaded, made up into trains, and shifted back and forth over the tracks of the company and connecting tracks of other railways. As stated in the opinion of the court, "Sometimes the cars were loaded, at other times empty, and at still other times some were loaded and others were empty. When loaded the freight in them was at times destined from within to without the state, or vice versa; at other times was moving only between points within the state, and at still other times was of both classes. When the cars were empty the purpose was usually to take them where they were to be loaded or away from where they had been unloaded. And oftentimes, following the movement of cars, loaded or empty, to a given point, other cars were gathered up and taken or started elsewhere. In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate; and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state." In holding that the plaintiff's intestate was not, at the time of the injury causing his death, employed in interstate commerce, the court invokes as a test the question, "Is the work in question a part of the interstate commerce in which the carrier is engaged?" The case under consideration in connection with that of *Pederson* v. *Delaware, etc., R. Co.,* 229 U. S. 146, would seem to establish this as a test question to determine the nature of the employment, without passing on its consistency with that which has found some favor in other courts, viz., "what is its (the injury's) effect upon interstate commerce?" *Lamphere* v. *Oregon R., etc., Co.,* 196 Fed. 336.

While this unanimous decision must be accepted as an authoritative and final interpretation of the act, it would seem that the court has inclined to a narrow and literal view of the statute in striking contrast to the liberality of some of its earlier decisions. In the Pederson case it was said to be an erroneous assumption "that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole." Does not the decision in the Behrens case depend on just such a separation? True, the particular cars then being moved contained no freight destined beyond the state borders, and the movement of the cars had no direct relation to interstate commerce. But is it not altogether too narrow a view to isolate a single switching operation from its relation to the business of the carrier as a whole? It is a matter of common knowledge that the trackage in a railroad yard is limited, and that the prompt handling of cars to be switched is necessary to prevent such a congestion as will interrupt through traffic. If the switching of intrastate cars were not done, it would only be a matter of hours before the carrying on of interstate commerce through that traffic center would be a physical impossibility. Is not the distinction between a switching movement which tends to clear the tracks for interstate traffic and the repair of a track used in such traffic (see *Pederson* v. *Delaware, etc., R. Co., supra,*) more apparent than real? The operation of a switchyard, like the repair of a track, cannot in any broad view be regarded as pertaining wholly to the movement of a particular car or train. It is part of the general plan of operation of the railroad, having a distinct relation to all the traffic thereon.

It is, however, in its practical operation that this decision seems to impose the greatest hardship. If the car being moved at the time contains a single article in the course of interstate transportation, the employees engaged in moving it are within the act. It therefore devolves on the injured employee, perhaps first coming to consciousness in a hospital weeks after the accident, to ascertain what car he was engaged in moving and what its contents were at the time, before he can bring himself within the statute. In view of the ease with which this information may be had by the carrier, and the difficulty with which it can be procured by an injured employee, it is certainly to be regretted that the court found it necessary to impose this burden on the employee.

It is a matter of congratulation that in the decision in which this interpretation of the act was given the possibility of its legislative correction was plainly enunciated.

It has been said that it was the purpose of Congress to include within the act all persons who could be so included within the constitutional power of Congress. *Colasurdo* v. *Central R. Co.,* 180 Fed. 832, affirmed 192 Fed. 901. In the Behrens case, however, the Supreme Court said: "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce." This language, while opening the door to further legislative action, lends some point to the view heretofore expressed that the court in this case has lapsed into a narrow view of the statute. If the phrase "interstate commerce" in the constitutional grant of power is capable of such an interpretation, it would seem not to be an unwarranted liberality to give a like scope to the phrase "engaged in interstate commerce" as used in the employers' liability act.

W. S.

WORKMEN'S COMPENSATION AND EQUALITY

WHO would have believed that the laboring men of the leading state in the American Union could have been so far deluded as to stand sponsors for a legislative declaration that "all men are not created equal; that they are not endowed by their Creator with the right to life, liberty and the pursuit of happiness." But this is exactly what they have done in the New York Workmen's Compensation Act; they have declared that in a vast majority of the industrial pursuits of the state the individual workers are incapable of maintaining the status of free men; that they must, perforce, be supplied with a public guardian, who shall dole out to them a pittance and look after them, not as sovereigns, but as wards of the state; that the industries of the state shall take on the burdens of the individual, without reference to those rules of justice and of law which form the mutual obligations of citizens of the state, and that the laborers as a body, as a condition of this burden, shall deny to themselves the rights of citizenship to enforce their rights in the courts. Is this stated too strongly? Let us look into the act as it bears upon the individual and his rights—what he is to get and what he is to give as the price for the concession, for even in a workmen's compensation act, as drawn by a representative of the workmen, the law of compensation is at work.

Section 10 of the Workmen's Compensation Act provides: "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employees resulting from accidental personal injury sustained by the employee arising out of and in the course of his employment, *without regard to fault as the cause of such injury," etc.* The next section provides that in the event of the employer refusing to comply with this provision, the employee may have a cause of action against the employer in which the latter shall be denied the benefit of all of the common law defenses, except that of the master's negligence. Leaving out of the discussion all matters affecting the rights of the employer, for modern legislation treats him merely as an outlaw entitled to no consideration, we pass to section 14 of the act which provides that "except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits," and then follows a method for determining what these average wages are, with some incidental provisions not necessary to be here considered, and section 15 provides the schedule of payments to be made. "In case of total disability adjudged to be permanent," sub-division one provides, "sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability," and it is further provided that the loss "of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability," while in all other cases permanent total disability shall be determined according to the facts. A temporary total disability is to be compensated at the same rate during the continuance of the disability, though not to an amount exceeding $3,500, and permanent partial disabilities, such as the loss of an arm, a leg, an eye, etc., are provided for in a schedule. at sixty-six and two-thirds per cent of the average weekly wages for a fixed number of weeks, and this "compensation for the foregoing specific injuries shall be in lieu of all other compensation, except the benefits provided in section thirteen," which provides for medical attendance, etc. Some further provisions are made for partial disabilities of a temporary nature, and one would be led to assume under sub-division one, for instance, that a man who had been drawing thirty dollars per week would be entitled to have a life allowance of twenty dollars per week; but here the cruelty and the inequality of the law manifests itself, for it is provided (sub-division 5) that the "compensation payment under sub-divisions one, two and four and under sub-division three except in case of the loss of a hand, arm, foot, leg or eye, shall not exceed fifteen dollars per week nor be less than five dollars per week," and that in the case of the loss of any of the members under sub-division three the compensation shall not exceed twenty dollars per week for the number of weeks fixed in the schedule. A laborer, we will say of skill, sobriety, intelligence and application to his work meets with an accident due to the neglect of a duty which the employer owes him. He has been receiving thirty dollars per week. Both his legs, we will assume, are gone; he has a family to support and educate, who have been moving along on the basis of thirty dollars per week. This calamity comes, and this skilled man finds himself a helpless wreck for life, owing, not to any fault of his own, but to the negligence of his employer, who would be called upon to respond in damages under the common law based upon his earning capacity, his suffering, and all other legitimate matters entering into the problem, yet he must settle down to live out the rest of his existence on $15.00 per week. Another man

working in the same place with a weekly salary of $22.50, who is reckless and improvident, and who is injured in the same manner absolutely through his own neglect of the ordinary care which at common law is exacted of all men, comes in on exactly the same footing; he, too, gets his $15.00 per week. Is this just; is this that equal protection of the law required by the Fourteenth Amendment to the Federal Constitution? Has society the right to penalize the competent, industrious, sober man that the incompetent may gain that which does not belong to him under any just code?

Passing the constitutional point suggested for the moment, let us follow along with our thirty-dollars-per-week man. We will assume that he passes through the ordeal of amputation and regains his health within a year, and settles down to his humdrum existence. But suppose at this time he is taken with a fever and passes away, what becomes of his compensation; what becomes of his family? The compensation lasts only during his disability, and if he dies at the end of a year from fever, his disability will be at an end; the compensation will cease, and he will have received $780. There is nothing for his estate; the property which he had in his life and health and strength, his constitutional right to life, liberty and property, have been taken from him by the wrongful act of his employer, and the state, by denying him access to the courts to enforce his rights at common law (as it does under the provisions of sections 20 and 52 and 53) has deprived him of his liberty and property without due process of law. On the other hand, the man who was drawing $22.50 per week, and who met with a like accident through his own fault, and without fault on the part of the employer, is permitted to receive his $15.00 per week during a long life, perhaps. He is taking the property which belonged to the first man, through an arbitrary act of legislation; he is benefiting through his own wrong to the injury of the man who was right, and this in the name of social justice.

But does the sober, industrious, honest and worthy employee hold his life, liberty and property subject to so uncertain a tenure; must he be the victim of arbitrary power? Is it the policy of this state to penalize the best of its productive energy that the worst may live in comparative ease? It would appear so from the legislation here under consideration, but there is a higher guardian of the rights of the individual, a political oversoul, as it were, which provides that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside," and that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (Amendment XIV., Constitution of the United States.) These are brave and comprehensive words, originally designed to safeguard the rights of the negro race just emerging from slavery, but they are broad enough to save any intelligent and high spirited white man from the degradation of servile labor; from the acceptance of employment under a system which requires him to renounce the rights of American manhood to an alleged social necessity; which demands that he shall sacrifice the right to accumulate property, making all lawful contracts therefor, and enforcing them through the courts, to the hypothetical well-being of the weaklings of society. The right of a citizen of the United States to make contracts for his labor; the right to accept the necessary risks of an employment, subject to the master's liability for the neglect of any duty which he owes to the employee, is fundamental; it is the only way in which his property right in his own strength and skill can be preserved for the benefit of his estate. The right to accumulate property, the right to go into the courts and to enforce a right of liberty or property, belongs to the individual in his capacity of a citizen of the United States, and that right cannot be taken from him by any individual state, if constitutional government is to prevail. This language, say the court in *Barbier* v. *Connolly* (113 U. S. 27), "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and *acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts;* that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling or condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as are prescribed for all for like offenses." Speaking to the same language, in *Yick Wo* v. *Hopkins* (118 U. S., 356, 369) the court say: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws. . . . But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or means of living, *or any material right essential to the enjoyment of life,* at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

This so-called Workmen's Compensation Act violates the right of the laboring man to contract; it says to him that he cannot make the ordinary contract of employment, which involves all of the rules of law governing such employment. It says to him, in the selected occupations, "You are not able to assert your rights and care for yourselves without the protecting arm of the state; the state must interfere with your independence of judgment and of action; you are a ward of the state." (*Lochner* v. *New York,* 198 U. S. 45, 57.) It says to him in effect that in taking employment in certain industries he must

surrender the rights of citizenship; he must consent to have his damages fixed by a tribunal in which he has none of the guarantees of due process of law; that he must be prepared to have his damages fixed by a mere arbitrary schedule, without any reference to his age or probabilities of life (unless in the case of a minor), and that no matter what his earning capacity, he can receive no more than a fixed sum per week; that he must, however careful, accept the same money return as the man next to him who practically invites the injury, and that, in the event of death from any other cause than the injury, the so-called compensation comes to an end. His right to accumulate property, which may be invaded by the negligence of the employer, is taken away, and in its place is given a dead-level measure of money to terminate upon death, no matter when that shall come, from any cause other than the injury. In the event of death the compensation can take no account of wages in excess of $100 per month, and the money is to be distributed, not as the decedent might desire under the general rules of law, but to relatives who, under ordinary circumstances, would not take at all. In other words, the Workmen's Compensation Act, so-called, makes the workman less than a man; it compels him to sacrifice the fundamental rights of life, liberty and property, and to accept in their place a mere arbitrary sum, determined without any reference to justice in the individual case. The proposition is monstrous! The laboring people have been tricked by their own representatives; they have been enslaved in the name of social justice, unless they are protected against themselves by the Fourteenth Amendment to the Constitution of the United States; unless in their generous impulses toward the colored man of the South they have builded better than they knew.

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PRENATAL INJURIES AS GROUNDS FOR AN ACTION

A NOVEL and interesting question, recently brought before the Missouri Supreme Court, is whether prenatal injuries furnish grounds for an action. This question naturally divides itself into two parts: First, has a child a right of action for injuries inflicted while *en ventre sa mère* by the negligence of another? Second, Have the next of kin or personal representatives of a child a right of action for its death caused by injuries received before its birth by the wrongful acts of another? As was said by Thomas, J., in *Nugent* v. *Brooklyn Heights R. Co.*, 154 App. Div. 667, 139 N. Y. S. 367, while the fact that a child is deformed as the result of a prenatal injury, and would suffer thereby, would cause the mother mental pain for which possibly a recovery might be had by the mother, yet the mental pain the child would suffer, and the mere fact of deformity with its consequent diminution of the value of capacities and faculties could not be included in her recovery. So the father, in case he could recover at all, could do so only so far as the injury enlarged the expense of the child's maintenance and entailed loss of service. Thus, however the subject be viewed, there is a residuum of injury for which compensation cannot be had save at the suit of the child. In fact, this very question as to the right of a mother to recover be- [illegible] of the deformity of her child, due to an injury received [illegible]er before the child's birth, came before the New Hampshire Supreme Court in *Prescott* v. *Robinson*, 74 N. H. 460, 69 Atl. 522, 124 A. S. R. 987, 17 L. R. A. (N. S.) 594, where it was held that a woman who was injured during pregnancy by a highway collision, caused by another's negligence, was entitled to damages for mental distress due to her fear or apprehension before the birth of the child that it would be deformed in consequence of the accident; but that she could not recover for her mental suffering after the birth of the infant and her prospective anxiety and disappointment, occasioned by its deformed and diseased condition, nor for the child's pain, suffering, and inability to labor.

The question as to whether there is a right of recovery by the child for this "residuum of injury" apparently has been before the courts but three times, and each time it has been answered in the negative. In two of the cases, *Walker* v. *Great Northern Ry.*, 26 L. R. Ir. 69, and *Nugent* v. *Brooklyn Heights R. Co.*, 154 App. Div. 667, 139 N. Y. S. 367, the question raised was as to the right of action against a carrier by a child who was injured before birth by the negligent act of the carrier, and in both of these cases it was held that the action could not be maintained, for the reason that at the time the injury occurred the plaintiff was not *in esse;* was not a person to whom the carrier owed any duty independent of the duty it owed the mother, as the carrier could not be supposed to contract for the safety of anyone of whom it had no knowledge. In *Walker* v. *Great Northern Ry., supra,* the question, however, whether such an action could be maintained, under any circumstances, by an infant, in its mother's womb at the time of the alleged injury, was discussed elaborately and with great learning both by court and counsel. O'Brien, C. J., after discussing the question, expressly declined to commit himself by an opinion, leaving it, as he said, "an open question," so far as he was concerned. Harrison, J., while basing his decision on the insufficiency of the statement of claim, said in his opinion: "When the accident occurred on the 12th of June the plaintiff was still unborn and had no existence apart from her mother, who was the only person whom the defendants contracted to carry on their line," etc. Johnson, J., in his opinion says: "If it did not spring out of contract, it must, I apprehend, have arisen, if at all, from the relative situation and circumstances of the defendant and plaintiff at the time of the occurrence of the act of negligence. But at that time the plaintiff had no actual existence—was not a human being and was not a passenger in fact; as Lord Coke says, the plaintiff was then *pars viscerum matris,* and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise toward that which was not *in esse* in fact and has only a fictitious existence in law, so as to render a negligent act a breach of duty." O'Brien, Asso. J., in his opinion said of the action: "It is admitted that such a thing was never heard of before, and yet the circumstances which would give rise to such a claim must at one time or another have existed." It would seem that the point that the carriers were liable on contract only was not well taken in these cases, since, quite apart from the theory of contracts, they are bound to carry on their business without negligence; and in both of the cases they were negligent. Since, then, the carriers were in default, they became liable to anyone who, without contributory negligence, was injured through a natural and necessary consequence of their default. It seems that the Walker case was taken to the Court of Appeal, and after a prolonged argument the court reserved judgment and allowed considerable time to elapse, when the child (the plaintiff) died, and judgment on the appeal was never pronounced. 1 Beven on Negligence (3d ed.) 76. In the Nugent case, Mr. Justice Thomas, in the course

of his opinion, strongly intimates that an unborn child is in existence so as to be entitled to the protection of his person as well as his property rights, for he says: "If, now, one should assault the mother, whereby violence would be transmitted injuriously to an unborn child, there seems to be no reason to deny him an action after his birth for his injuries. . . . It would be no answer to the trespasser that the child was concealed in the mother's womb. The wrongful act initiated by the assailant would reach the child, as it might result in tortious contact with any third person, although that was not within the purpose of the actor. So, if a tort be an act of negligence, the remedy is not confined to the person next to the act in sequence. But it may be answered that an unborn child is not an entity. Hence a trespass upon it does not invade the personal rights of a human being so as to admit of a civil remedy at its instance after birth. And so it is argued, in effect, that an unborn child is not a member of political society so as to be related to others engaged in any of the activities or subject to any of the conditions of life. From this it would be argued that no person actually born owes an unborn any duty of which there can be a culpable breach. That is, none of the rights of the person attach to him, because he is not a person. It is repeating arguments several times advanced in this connection to say that an unborn child has, conditioned upon its birth, usual rights of property, and the remedies that pertain to them for actionable injuries inflicted before his birth. The being that owns is the supreme consideration and has capacity for ownership. What is owned and the right to own are merely incidental to the living entity. And yet shall the incidents be valued in legal cognizance and the owner not? But when in legal apprehension for purposes of property rights does the entity begin? And what are its capacities? It is sufficient for present purposes to state that it begins before birth, and that it has all the capacities of born persons to receive property, and after birth to enjoy it, and redress prenatal injuries to it. . . . Is not the right to be born with normal faculties and capacities for its benefit? If so, he who takes it away deprives the child of the highest good. . . . It is to this conclusion that an unborn child is not in existence so as to be entitled to the protection of his person as well as his property that I dissent. It is not helpful to characterize its existence as fictitious as to property rights. The rights are accorded to it. The indisputable fact is that one is answerable to the criminal law for killing an unborn child, who, to that end, is regarded as *in esse,* and the further fact is that the unborn child, so far as the property interests are concerned, is regarded as an entity, a human being with the remedies usually accorded to an owner. But the argument then proceeds that one must respect the rights of ownership, and, so far as a civil remedy is concerned, disregard the safety of the owner. In such argument there is not true sense of proportion in the protection of rights. The greater is denied; the one lesser and dependent on the very existence of a person *in esse* and entitled to protection is respected." This case, however, was decided in favor of the defendant on the same ground as the Walker case, viz., that a carrier owed no duty to an unborn child separate from its duty to the mother. The court said: "This is an action for negligence, for violation of defendant's duty as a carrier, and defendant cannot be judged as a trespasser. Negligence is culpable failure to observe a duty owed by one to another in a particular relation, and remedy is allowed for injury therefor. What duty did the defendant as a carrier owe the unborn child? The child in its distinct entity was not a passenger, and the company owed it as a separate person no duty in the matter of safe carriage. Had it, born, been carried in its mother's arms, it would have been a gratuitous passenger, but the carrier's duty towards it would not have been thereby lessened. . . . But it is not the duty of a carrier to scrutinize its passengers for the detection of unborn children, to the end that they, although latent, may be regarded as passengers. It undertakes to carry as passengers the born, and not the unborn. It carries by compulsion those visibly offering themselves. So the mother presents herself and her living children, and the carrier is bound by the law of the realm to receive and carry them. Its duty begins with receiving and ends with discharging them, and due care is required. The plaintiff stood in no such relation to the carrier as to earn such obligation on its part, and liability to respond for injury for the negligent carriage and discharge of the mother was coincident with the limits of its duty to her."

In the only other case dealing with this phase of the question, *Allaire* v. *St. Luke's Hospital,* 184 Ill. 359, 56 N. E. 638, 75 Am. St. Rep. 176, 48 L. R. A. 225, *affirming* 76 Ill. App. 441, an action on the case was brought by the plaintiff to recover for a permanent deformity, caused by an injury received by his mother shortly before his birth, as the result of the negligence of the employees of the defendant's hospital at which she was staying awaiting her confinement. The Supreme Court of Illinois concurred in the opinion written by the Illinois Appellate Court, which gave as its reason for deciding against the plaintiff that the right was not given by statute, and that the courts of the common law had never gone to the extent of sustaining an action by an infant for injuries occasioned before its birth.

While the Walker case and the Nugent case may be sustained on the ground that the defendant railroads observed every duty they owed the unborn child arising out of their position as common carriers, as it was not shown that they had knowledge of the existence of the child, or of the condition of the mother, or that there was any contract with reference to the carriage of the child, or any consideration paid for such carriage, although as before indicated this seems not a good distinction, yet even such considerations did not apply in the Allaire case. There the hospital knew of the condition of the mother and contracted with direct reference to the safety of the mother and the unborn child, and received compensation for a performance of a duty to both. The reasoning in support of these three cases, especially the Allaire case, is far from convincing. Mr. Justice Boggs, in his dissenting opinion in that case in the Supreme Court, is much more consistent and logical. He says in part: "It may be conceded no case adjudicated at the common law can be found wherein a plaintiff was awarded damages for injuries inflicted upon his person whilst in the womb of his mother. But an adjudicated case is not indispensable to establish a right to recover under the rules of the common law. Lord Mansfield declared: 'The law of England would be an absurd science were it founded upon precedents only. Precedents,' he observed, 'were to illustrate principles and to give them a fixed certainty.' . . . A child *en ventre sa mère* was regarded at the common law as *in esse* from the time of conception for the purpose of taking any estate, whether by descent or devise, or under the statute of distribution if the infant was born alive after such a period of fœtal existence that its continuance in life was or might be reasonably expected. . . . Though it was the rule of the common law if one should unlawfully beat a woman pregnant with child, and thereby cause the child to die in the body of the mother, the crime was not deemed to be murder, but the ancient crime of homicide or manslaughter, still the doctrine of the common law was, if the child should not die in the womb of the mother, but should be born alive, and should afterwards die in consequence of the assault

while in the womb of the mother, the offense was deemed to be murder. (3 Inst. 50; 1 P. Wms. 245.) If, in the contemplation of the common law, life begins as soon as the infant is able to stir in the mother's womb, and that an injury inflicted upon an infant while in the womb of the mother shall be deemed murder if the infant survives the wound during prenatal life but succumbs to it and dies from it after being born, and if every legitimate infant *en ventre sa mère* is to be deemed as born for all purposes beneficial to the child, why should it be supposed the common law would have denied to an infant born alive the right to recover damages for the injury inflicted upon it while in the womb of the mother? Had such injury, though inflicted on the child while in the mother's womb, been sufficient to cause the death of the infant after it had been born alive, the common law would have regarded the injury as having been inflicted upon a human being and punished the perpetrator accordingly; and that being true, why should the infant which survives be denied the right to recover damages occasioned by the same injury?"

On that phase of the question as to whether there is any right of recovery by the next of kin or personal representatives of a child which dies after birth as a result of prenatal injuries received through the negligent and wrongful act of another, it must be admitted at the outset that if there is such a right it must necessarily be founded on statute, as it has been too often decided to be now questioned that the common law does not allow an action for negligence to survive the death of the person injured. This question apparently has been presented in only three cases, all arising in this country, and in each of them it has been held that a statute giving a right of action for death by wrongful act does not give an action for death of a child caused by injuries received before its birth. The first of these cases was *Dietrich* v. *Northampton,* 138 Mass. 14, 52 Am. Rep. 242. In that case it appeared that a woman four or five months advanced in pregnancy slipped and fell by reason of a defect in the highway, and in consequence of such fall had a miscarriage. The child was alive when delivered, but was too little advanced in fœtal life to survive its premature birth and died before its was severed from its mother. The person of the infant was not directly injured otherwise than by a communication of the shock to the mother, and it was held that an action to recover damages did not accrue to an administrator of the child. The court appeared to base its decision principally on lack of precedent, for Holmes, J., said: "But no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb. Yet that is the test of the principle relied on by the plaintiff, who can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment." The next case in point of time is *Gorman* v. *Budlong,* 23 R. I. 169, Atl. 704, 91 Am. St. Rep. 629, 55 L. R. A. 118. In this case, as in the Dietrich case, *supra,* it appeared that the premature birth of the child was caused by injuries received by the mother, and the child lived only a short time. It was held that there could be no recovery under a statute giving a right of action for death by wrongful act. The court, after considering the Walker, Dietrich and Allaire cases, *supra,* reached the conclusion that, if the infant had survived, he could not have maintained an action for injuries received by him while in his mother's womb, and consequently that his next of kin, under the statute, could not maintain an action therefor after his death. It is possible to distinguish this and the Dietrich case from all of the other cases cited herein on the ground that in each of these cases the child, at the time of the injury, was not capable of continued existence independent of its mother. The latest case dealing with the question is *Buel* v. *United Rys. Co.,* 248 Mo. 126, 154 S. W. 71, 45 L. R. A. (N. S.) 625. The facts of this case are as follows: The plaintiffs were the mother and father of a child who was born on the 25th day of December, 1907, and died on the 5th day of July, 1908. On the 22d day of September, 1907, while the mother was enceinte of said child, she and her husband and another child were passengers on defendant's street railway, which was stopped at their signal to enable them to alight, and while they were so doing, and the mother was assisting the child who was riding with them to leave the car, it was negligently put in motion, thereby dragging and throwing her to the ground and inflicting injuries on the arm and body of her unborn child that ultimately caused his death. The court held that an action for the death of the child could not be maintained under a statute giving a right of action for death by wrongful act. The theory of the decision is that, as the paramount object of the legislature in giving a right of action for a "person dying" through the negligence of another was to create a survival of actions which would have lapsed at common law upon the death of the person injured, it could not have intended to give an action for a death resulting from prenatal injuries as, at common law as it had at that time been adjudged, no right of action accrued to such child after its birth; and, hence, there was no prior right to sue which the statute could take hold of and cause to survive the death of the person injured.

It is submitted that a rule far more consistent with justice and reason than that laid down in the cases heretofore cited, and more in accord with the theory of other branches of the law with regard to the rights of an unborn child, would be that whenever a child *in utero* is injured through the negligence of another, and such child is afterwards born alive, either prematurely or in the due course of nature, it should have a right of action for the injuries thus received, and that if such child dies after its birth, as a result of such prenatal injuries, its next of kin or personal representatives should be allowed to recover for its death under statutes giving a right of action for death by wrongful act.

F. E. R.

Cases of Interest.

FIRING IN THE AIR BY POLICE OFFICERS IN PURSUIT OF FUGITIVES AS RECKLESS USE OF FIREARMS.—A custom among police officers to fire their pistols when pursuing fugitives, even where they were misdemeanants, as a ruse to prevent their further flight, was unqualifiedly condemned by the Supreme Court of Mississippi in State *v.* Cunningham, 65 So. 115, on the ground that it constituted a reckless use of firearms. The court said: "Officers should make all reasonable efforts to apprehend criminals; but this duty does not justify the use of firearms, except in the cases authorized by law. Officers, as well as other persons, should have a true appreciation of the value of a human life."

PENALTY FOR FILLING BILL OF EXCEPTIONS WITH IRRELEVANT MATTER.—The Massachusetts Supreme Court is getting after lawyers who file inordinately long bills of exceptions containing much irrelevant matter, and the imposition of a penalty for doing so is threatened. Thus in Isenbeck *v.* Burroughs, 105 N. E. 595, the court through Judge Sheldon said: "This bill of exceptions is unnecessarily and unreasonably long. . . .

The real questions raised at the argument are so covered up by a mass of irrelevant matter as to involve a serious danger that something material may be overlooked. Such a bill ought not to have been brought before the court. It may become a question, if this practice shall be persisted in and the objection shall be seasonably taken, whether such a bill ought not to be dismissed without argument." Again in Romana *v.* Boston Elevated R. Co., 105 N. E. 598, the court speaking through the same judge said: "This bill of exceptions is of a kind that is becoming too frequent—so frequent as to suggest that if persisted in it may call for drastic action to be taken by the court of its own motion. It is such a bill as ought not to have been presented or allowed. It calls for undue effort on the part of the court to pick out the few important facts from the undigested mass of irrelevant and impertinent facts with which they are covered up." Still again in Corsick *v.* Boston Elevated R. Co., Judge Sheldon began an opinion by saying: "These exceptions ought not to have been presented by counsel or allowed by a judge in the form in which they come before us."

USE OF MICROSCOPE AS AID TO HANDWRITING EXPERT IN DETERMINING AGE OF INK.—That a handwriting expert may give to the jury information which he acquired by the aid of a microscope, indicating the age of ink, is the holding of the court in Williams *v.* Williams, (Me.) 90 Atl. 500. The proposition is not a novel one, having received the support of authorities elsewhere, but it seems never before to have arisen in Maine. The question got before the appellate court in this wise. One Hamilton, called by the plaintiff as an expert in the trial court, was asked, "What do you see under the microscope as indicating the age of ink?" and the question was admitted against the objection "that microscopes should not be used, because no two sets of eyes will see it under the microscope the same way." On exception taken to the admission of the evidence the action of the trial court in admitting the evidence was approved in an opinion containing the following language: "The precise reason stated against it might be answered by the suggestion that it is probably true that no two sets of eyes will see the same thing in the same way, even when unaided by any particular instrument; but the objection no doubt was intended to raise the point that a witness should be permitted to give to the jury only such information as he has acquired through his own unaided senses, without the use of abnormal processes or instruments. But the rule is not so limited. The source of a witness's testimonial knowledge is not so circumscribed. Various processes and instrument aiding the senses have from time to time been employed and sanctioned as proper to be used in the acquisition of testimonial knowledge, and among them the microscope."

LIABILITY OF STREET RAILWAY COMPANY FOR OBJECTIONABLE REMARKS ADDRESSED BY CONDUCTOR TO PASSENGER.—The rule that objectionable remarks addressed by a street-car conductor to a patron of the road, may give rise to a cause of action in favor of the patron against the carrier is amusingly illustrated in Haile *v.* New Orleans, etc., Light Co., La. 65 So. 225. It there appeared according to the plaintiff's testimony that the conductor said to her, "You had no business sitting in front of the car—a big fat woman like you had no business sitting in front of the car. Why didn't you sit in the back?" This language the plaintiff claimed resulted in humiliation and mortification to her, and the court and jury took the same view and awarded a verdict and judgment for five hundred dollars. On an appeal the judgment was affirmed, the opinion of the Supreme Court of Louisiana being in part as follows: "The personal appearance of a patron of a street car is not a proper subject of comment by the employees of the defendant company. Neither should the conductor undertake to dictate to a passenger as to where she should sit in a car which has no reserved seats. The language used by defendant's employee was humiliating and mortifying to a sensitive woman, and defendant did not give to plaintiff that care and respectful consideration and attention which it, as a common carrier, owed her while she was using its car, and it is responsible in damages for the annoyance and injured feelings caused to plaintiff through the fault of its employee."

MARRIAGE OF FEMALE TEACHER AS GROUND FOR HER DISCHARGE.—While it is a mooted question whether the efficiency of our public-school system is not best secured by the employment of female teachers who are unmarried, thereby discriminating against married women, it would seem as if the marriage of a female teacher while under a valid contract with a school board should not entitle the board to terminate the contract; and this is the view taken by the West Virginia Supreme Court in the recent case of Jameson *v.* Board of Education, 81 S. E. 1126. A statute of that state provides that a school teacher may be removed for "incompetency, neglect of duty, intemperance, profanity, cruelty or immorality," and the court held that marriage was not covered by any of these, and therefore did not constitute in and of itself ground of removal. Commenting on New York authorities on the same subject the court said: "This subject has been recently before the courts of New York, in the case of People *v.* Board of Education, 82 Misc. Rep. 684, 144 N. Y. S. 87, Supreme Court, New York County, November 15, 1913, and on appeal in the Supreme Court, Appellate Division, First Department, February 6, 1914, 160 App. Div. 557, 145 N. Y. Supp. 853. The court in the first case held, under the statute of New York, similar in its provisions to our own, that a female teacher in the public schools could not be removed because of her marriage. On appeal, the appellate division reversed the judgment, not upon the ground of marriage, but for other reasons, and among other things held, point one of the syllabus: 'That the absence of a married woman teacher that she might bear a child might be of such length as to give the board of education jurisdiction to remove her for neglect of duty, though she might not be removed on that ground merely because of absence for that purpose.' We have no question of absence or neglect of duty, or other ground of removal present in this case. As marriage is not a ground of removal under the statute of this state, the action of the board in removing plaintiff, or in revoking or attempting to revoke its action is unfounded."

VALIDITY OF STATUTE PROHIBITING ADVERTISEMENTS RELATIVE TO ANY DISEASE OF THE SEXUAL ORGANS.—A Colorado statute authorizing the State Board of Medical Examiners to revoke a physician's license to practice medicine in the state for "causing the publication and circulation of an advertisement relative to any disease of the sexual organs" was declared invalid in Chenowith *v.* State Board of Medical Examiners, (Colo.) 141 Pac. 132, on the ground that while the legislature had the right to reasonably regulate the licensing of physicians by virtue of the power of the state to provide for the general welfare of the people, the regulation in question was unreasonable. Judge Scott for the court delivered a strong opinion on the limitations of the legislature with respect to the exercise of the police power. In part he said: "The statutory ground in this case is 'causing the publication and circulation of an advertisement relative to any disease of the sexual organs.' The only statute of similar import brought to our attention is that of Nebraska (4327, Neb. Comp. Stat.). In that statute, however, are found the qualifying words

'tending to injure the morals of the public.' In the statute under consideration, the mere publication of the advertisement, regardless of its tendency, is sufficient to authorize the revocation of the license, and it must be presumed that the action of the board was based solely upon the fact of the publication, as it was authorized to do by the language of the statute. Under this statute, then, no matter how harmless or innocent may be the publication, nor what may be the chasteness of its language nor the utter absence of any tendency to injure the morals of the public, yet the very fact of the publication of the advertisement is sufficient to take from a physician his license and the right to practice his profession. If this is to be justified under the statute, then the very basis upon which rest such statutes of regulation must be ignored. For such legislation is justified only upon the ground of police power and as tending to promote the public health, morals, safety, or general welfare. Advertisements by physicians may be regarded by certain members of the profession as contrary to professional ethics, but with that legislatures and courts may not be concerned. The legislature has no power to confer the authority upon a Board of Medical Examiners to deny to a physician the right to advertise his business."

Sufficiency of Evidence Warranting Judgment Against Municipality for Failure to Make Highway Blocked with Snow Passable.—A case of considerable interest is Lunny *v.* Inhabitants of Shapleigh, (Me.) 90 Atl. 496. The action was trespass on the case brought by an inhabitant of the town of Shapleigh against the town for damages which he alleged he sustained peculiar and different from those sustained by the public generally, by reason of a certain way in the town of Shapleigh being, as he alleged, so incumbered with snow as to be impassable during a certain portion of the winter of 1912. The action was brought under a statute which read as follows: "When any ways are blocked or incumbered with snow the road commissioner shall forthwith cause so much of it to be removed or trodden down, as will render them passable. The town may direct the manner of doing it. In case of sudden injury to ways or bridges, he shall, without delay, cause them to be repaired. And all damage accruing to a person in his business or property, through neglect of such road commissioner or the municipal officers of such town, to so render passable, ways that are blocked or incumbered with snow, within a reasonable time, may be recovered of such town by a special action on the case." The jury returned a verdict for the plaintiff, and the defendant asked the Supreme Court sitting *en banc* to set aside the verdict, and to grant a new trial, because there was no basis for such a verdict against it, and must have been the result of prejudice, passion, partiality, and bias on the part of the jury. This the court refused to do, giving as its reason the following: "This statute, it is evident, was enacted to meet what might perhaps be called emergencies. It requires that ways blocked or incumbered with snow shall be forthwith made passable, that is, in a reasonable time. The undisputed evidence seems to show that the snow along this road for some distance was from four to six feet deep; that single teams had gone over the top of this snow, thus hardening a single track over which one team, with the exercise of sufficient care, might keep in the track and pass over the road. It further appears, and seems to be undisputed, that teams could not turn out. The manner in which they broke the road on March 8th is also significant of the condition in which it had been for several days previous. It seems that on this day, besides a crew of men, they used a harrow to break up the snow. If this piece of road had not been in an entirely different condition from the other roads, no such special effort would have been required to break it out. Another marked feature as to the condition of the road was shown by one of the defendants' witnesses, who admitted that he stopped overnight with the mail carrier on account of information as to the impassability of this piece of road. He claimed that, had he known the condition as it actually was, he might have passed it over. The plaintiff also gave notice to the selectmen of the condition of the road, and requested them to make it passable. Upon notice one of the selectmen said: 'I sent a notification to the surveyors to open the road.' And again says: 'The road was opened.' This language of a town officer is quite significant of the condition of the road before 'it was opened.' All these things, and many others which appear in the testimony, furnish fairly good evidence to those acquainted with country roads, and the method of breaking them, that this piece of road was actually in a pretty bad condition, and presented for the jury to determine the question whether it was so bad as to come within the meaning of the statute, under a fair, clear and discriminating charge given by the presiding justice. They said it did, and gave a small verdict to the plaintiff. It cannot be regarded as excessive. We do not feel required to set it aside."

Privilege of Naming Child as Valid Consideration for Promise to Pay Money and Right of Child to Sue Thereon.—In Gardner *v.* Denison, Mass. 105 N. E. 359, which was an action by a minor by his next friend against an administrator, the facts were as follows: The plaintiff's father, who was on friendly terms with the defendant's testator, Edward Gerrish, told the latter, in November, 1900, that the birth of a child was expected in his family. Mr. Gerrish, after several interviews, promised that if a boy should be born and named for him, Edward Gerrish Gardner, he would make some provision for the child. When the child was born, on January 1, 1901, he was named for the defendant's testator. On January 23, 1901, the plaintiff's father, at the request of Mr. Gerrish, wrote at the latter's dictation the following: "Jan. 23, 1901. I, Edward Gerrish, promise to place in trust for Joseph A. Gardner's youngest son, born Jan. 1, 1901, $10,000, for naming his son after me. Edward Gerrish Gardner." No specific sum of money had been mentioned before. Mr. Gerrish then signed the paper in the presence of the plaintiff's father, who took the possession and control of it. Mr. Gerrish later lived in the family of the plaintiff's father and showed special attention to the child, bestowing many gifts upon him and constantly referring to him as 'my boy.' He died in 1906 at the age of 64 years, leaving a large estate without having made any provision for the benefit of the plaintiff. On these facts there was a directed verdict for the defendant and the plaintiff brought exceptions which were sustained on grounds stated by the court as follows: "The privilege of naming a child is a valid consideration for a promise to pay money. The child had a direct and immediate interest in his name and is more affected by it than anyone else. He loses the opportunity of receiving a more advantageous name, and is compelled to bear whatever detriment may flow from the name imposed upon him. The consideration moves in part from the child, although he is not in a position personally to yield an assent to the promise at the time it is made. It is a general rule that one who is not a party to a contract cannot bring an action on it even though it be made for his benefit. But the circumstances of the parties respecting the naming of the child are so peculiar, the nearness of the relation so great, and the obligation resting on the father and mother so important, and the consequence to the child so vital, that the inference may be drawn that the father is acting in the interests of and as agent for the son in making any contract as to giving him a name. . . . This action is brought in the name of the son by his father as next friend. That is a

relinquishment of the father's personal rights, as far as it ever might have been antagonistic to the son, and is equivalent to an assertion that whatever he did was done as agent for the son. The writing, signed by the plaintiff, while inartificially expressed, in substance is a declaration by the defendant's testator that he acknowledges himself indebted in the sum of $10,000 for the privilege granted him of having the plaintiff bear his name. The words 'in trust' in the absence of any definition of the terms of any trust may be treated as meaning nothing more than the expression of a general purpose that the promise was for the benefit of the plaintiff. No promise being named in the instrument, all the attendant conditions may be examined for the purpose of determining to whom in fact the promise to pay was made. Such resort to extrinsic circumstances is not for the purpose of changing the writing, but applying it to its proper object."

Validity of Statute Prohibiting Use of Trading Stamps Except on Payment of Excessive License Fee.—In 1913 the legislature of Washington passed an act forbidding the use in connection with the sale of goods, wares, or merchandise, of any stamps, coupons, tickets, certificates, cards, or other similar devices, unless a license fee in the sum of six thousand dollars per annum was paid, as specified in the act. A violation of any of the provisions of the act was made a gross misdemeanor. In State *v.* Pitney, (Wash.) 140 Par. 918, the defendant was by information charged with the crime of using trading stamps in violation of said act, and he demurred to the information on the ground that the act was unconstitutional. His contention was upheld in the lower court, and a judgment of dismissal was entered, but on appeal by the state the judgment was reversed. The court hearing the appeal, through Judge Main, said: "If the law under consideration is a proper exercise of the police power, its constitutionality will hardly be denied. In determining the validity of the law, therefore, inquiry must be directed to whether its provisions come within the scope of the 'police power.' The early decisions define this power as extending to those regulations promulgated by or under the authority of the legislature which had for their object the promotion of the public health, the public morals, or the public safety. Without reviewing the evolution of the law upon this subject as evidenced by the decisions of courts of last resort, it may be said that, whatever may be the limits by which the earlier decisions circumscribed the power, it has in the more recent decisions been defined to include all those regulations designed to promote the public convenience, the general welfare, the general prosperity, and extends to all great public needs, as well as regulations designed to promote the public health, the public morals, or the public safety. . . . What state of facts might reasonably have prompted the legislature to forbid the use of trading stamps in connection with the sale of merchandise? It might reasonably be supposed or presumed that the legislature believed that the use of these stamps would encourage indiscriminate and unnecessary purchasing by people ill able to indulge in any extravagance. Or suppose that the legislature believed that the use of these stamps was practically forced upon certain merchants without any practical benefit resulting therefrom, and thus they were compelled to pay 3½ per cent upon their gross sales for the use of the stamps. The legislature might reasonably have believed that the stamp companies, in order to cause the stamps to be used in a certain city, would contract with one merchant for their use, agreeing to pay him a percentage of the sums collected by them from other merchants, and then use the first contract so secured to force other merchants into using the stamps, or suffer loss of trade by failure so to do. In other words, that legitimate business was virtually coerced into paying tribute to the stamp company, a nonproducer of wealth or value. . . . That the law was not passed in response to 'sporadic impulse or exuberant displays of emotion,' but embodies a settled conviction that the use of trading stamps is harmful, is evidenced by the fact that the legislature at two different sessions has legislated against their use, first in 1905 (Laws of 1905, p. 374) and second, in 1913, the present law. We think this act of the legislature falls within the scope of the police power as it is now understood and defined by the courts, and therefore the legislature did not exceed its power or offend against any constitutional provision, either state or federal, in promulgating the regulations or prohibitions found in the act. This conclusion, it must be admitted, is not in harmony with the great weight of authority, numerically speaking. But many, if not most, of the decisions that have held trading-stamp laws inimical to the due process of law clause found in the constitutions, were decided when the police power was defined as having a more limited scope than it has at the present time. In considering the law of 1905 prohibiting the use of trading stamps, this court, in Leonard *v.* Bassindale, 46 Wash. 301, 89 Pac. 879, held that law unconstitutional. The holding in that case is the exact opposite of the conclusion we have reached in this case. That decision will therefore be overruled. The opinion in that case contains a suggestion that the court there concluded to follow the weight of authority, even though it would have been inclined, were the question one of first impression, to sustain the law. It was there said: 'While we might, were the question one of first impression in the courts, entertain a different opinion, we have felt impelled to follow the great weight of authority and hold the statute constitutional, especially in view of the fact that the federal courts have shown an inclination to hold the statute in contravention of the constitution of the United States.' As already stated, the due process of law clauses in the state and federal constitutions are substantially the same. While a number of the subordinate federal courts have held that a trading-stamp law contravenes the due process of law clause of the federal constitution, the United States Supreme Court, so far as we are informed, has never spoken upon that question. The result of this case will offer an opportunity to have the question there presented and finally determined by the court of highest authority."

New Books.

Manual of Federal Procedure. By Charles C. Montgomery, B.A., LL.B., of the Los Angeles, California, Bar. San Francisco: Bancroft-Whitney Co., 1914.

The author of the volume is an instructor in Federal Procedure in the University of California. His book contains, in orderly arrangement, and verbatim, all the federal statutes and court rules (except district courts) relating to the practice and procedure of the ordinary law, equity, or criminal case in the federal courts, with many forms and suggestions as to the steps to be taken in such cases. Many of the statutes are annotated, as are also some of the rules of court, such as the new equity rules. The forms are not collected in one place as frequently happens in books of procedure, but are scattered through the work in juxtaposition to the laws or rules on which they are based. The manual is not and was not intended to be an exhaustive treatise, but was designed as a guide book, which it is. The author has handled his material with discrimination and

ability and with a fine knowledge of the needs of the profession. The volume is very attractively gotten up, being printed on thin paper, and bound in flexible leather covers. The publishers deserve credit for its handsome appearance and convenient size.

Cyclopædia of American Government. Edited by Andrew C. McLaughlin, A.M., LL.B., LL.D., Professor of History, University of Chicago, and Albert Bushnell Hart, Ph.D., LL.D., Professor of the Science of Government, Harvard University. Volume I. Abattoirs—Finality. New York and London: D. Appleton & Co., 1914.

A Cyclopædia of American Government is an entirely new idea and its reception by the public will be eagerly awaited. That there is a lively interest taken in the subject is clearly apparent, and especially is this so at colleges and universities, which but a few years ago gave little or no attention to it. Many public schools even, now instil in their students a taste for it. The publishers of this new work are fortunate in the character and accomplishments of the editors and contributors. They include the best the country affords, and they are numerous enough to indicate that students and teachers of the topics presented are alive to the importance of the undertaking. "Government," as the word is used in the cyclopædia before us, is a comprehensive term; it includes the theory or philosophy of political society, the forms of political organization—whether those forms have been laid down in distinct written law or are only more or less permanent modes of expressing the public will—the methods and agencies by which law or governmental purposes are usually carried out. In the words of the editors, "a considerable portion of the cyclopædia is made up of articles on the theory of principles of government; though these articles cannot be exhaustive and all-conclusive, they do present sharply, though briefly, the essential and fundamental doctrines and principles underlying political order and social activity; they are, moreover, prepared from such a viewpoint as to make them serve as a basis for an understanding of existing government and for appreciating actual American conditions and problems. In addition to political theory, thus practically treated, the volumes contain discussions of the principles of international law, constitutional law, party organization and action, and they present in brief form the most significant and fundamental principles of economic theory." The work is meant to supply the need for a usable, succinct, and comprehensive presentation of practical, actual and theoretical government in America, and judging from the first volume its aim will be realized.

News of the Profession.

THE VIRGINIA STATE BAR ASSOCIATION will meet in annual session at Hot Springs, Va., on August 4, 5 and 6.

CHIEF JUSTICE RETIRES.—James F. Ailshie, Chief Justice of the Supreme Court of Idaho, resigned from the bench on July 20.

THE MISSOURI BAR ASSOCIATION will hold its next annual meeting at St. Louis during the week of September 20.

RESIGNS FROM APPELLATE COURT.—Judge Thomas C. Clark, of the Appellate Court of Illinois, First District, has resigned from the bench.

ELECTED DEAN OF LAW SCHOOL.—Prof. Everett Fraser has been elected dean of the law school of George Washington University to succeed Dean Gregory, resigned.

CHOSEN FOR FEDERAL BENCH.—John H. Clark, of Cleveland, O., has been appointed by President Wilson as United States Judge for the northern district of Ohio.

APPOINTED TO BENCH IN IOWA.—J. W. Willett, of Tama, has been appointed by Governor Clarke as judge of the Seventeenth Judicial District of Iowa, to succeed Judge C. E. Nichols, resigned.

NAMED FEDERAL JUDGE.—H. Seward Thompson has been named by President Wilson as Federal Judge for the Western District of Pennsylvania, with headquarters at Pittsburgh.

CHANGE IN LAW SCHOOL HEAD.—William Draper Lewis, for many years dean of the Law School of the University of Pennsylvania, has resigned and has been succeeded by William E. Mikell, a professor of law in the school.

APPOINTED AMBASSADOR TO RUSSIA.—President Wilson has appointed George T. Marye, a lawyer of San Francisco, Cal., ambassador to Russia. Mr. Marye will succeed Ambassador Curtis Guild, Jr., who resigned several months ago.

DEATH OF ILLINOIS JUDGE.—Robert B. Shirley, for twenty-one years a judge of the Circuit Court of Illinois, and since 1909 a member of the Appellate Court for the fourth appellate district, died at Carlinville, Ill., on June 22, aged sixty-four.

NAMED ASSISTANT SECRETARY OF TREASURY.—George T. Page, an attorney of Peoria, Ill., and formerly president of the Illinois State Bar Association, has been named by President Wilson as assistant secretary of the treasury to succeed Charles S. Hamlin.

APPOINTED TO BENCH IN ILLINOIS.—Former State Senator Frank W. Burton, of Carlinville, has been appointed by Governor Dunne, of Illinois, to fill the vacancy on the bench of Circuit Court, Seventh Circuit, caused by the death of Judge Robert B. Shirley.

SPECIAL ASSISTANT TO ATTORNEY GENERAL NAMED.—Robert W. Childs, assistant United States attorney in Chicago for the last ten years, has been appointed a special assistant to Attorney General McReynolds. He has been assigned to conduct government cases in Rhode Island and Connecticut.

TEXAS BAR ASSOCIATION.—The thirty-third annual convention of the Texas Bar Association was held at Dallas, Tex., on July 7 and 8. The program as announced included the following: Address of welcome, by Mayor W. M. Holland, of Dallas; response on behalf of bar association, by Judge W. C. Morrow, of Hillsboro; president's address, by W. W. Searcy, of Brenham; "Muckraking the Constitution," by Rome G. Brown, of Minneapolis; "The Roman Law in the New World," by Hannis Taylor, of Washington, D. C., ex-Minister to Spain; "The Selection of Judges," by J. D. Walthall, of San Antonio.

WISCONSIN STATE BAR ASSOCIATION.—The annual meeting of the Wisconsin State Bar Association was held at Green Bay, Wis., on June 25 and 26. President C. B. Bird, of Wausau, devoted his opening address to a discussion of "This Association, What It Can Be and Do." Chief Justice John B. Winslow, of the Wisconsin Supreme Court, read a paper on "Courts of Conciliation," and William R. Riddell, Chief Justice of the Supreme Court of Ontario, Canada, delivered an address on "Criminal Law

and Procedure." Christian Doerfler, of Milwaukee, was elected president of the association for the ensuing year.

AMERICAN BAR ASSOCIATION.—The next annual meeting of the American Bar Association will be held at Washington, D. C., on October 20th, 21st and 22nd, 1914. The time and place agreed on will make it possible for President Wilson and the Justices of the Supreme Court of the United States to attend, if their other engagements will permit. The federal and state Courts are being urged to adjourn during the week of the meeting, or to excuse from attendance before them lawyers who wish to be in Washington at that time.

OHIO STATE BAR ASSOCIATION.—The thirty-fifth annual meeting of the Ohio State Bar Association was held at Cedar Point, O., on July 7, 8 and 9. The President's address was delivered by Harlan F. Burket, of Findlay, and the annual address by Charles S. Whitman, district attorney of New York county, N. Y. George F. Arrel, of Youngstown, gave an appreciation of the late Supreme Court Judge William T. Spear. Other addresses were on the "Juvenile Court," by Roland W. Baggott, Probate Judge of Dayton, and on "Workmen's Compensation," by Dudley R. Kennedy, of Youngstown.

KENTUCKY STATE BAR ASSOCIATION.—The thirteenth annual meeting of the Kentucky State Bar Association was held at Mammoth Cave on July 8, 9 and 10. The official program included an address of welcome by Judge McKenzie Moss, of Bowling Green; president's address by W. P. Sandridge, of Owensboro; annual address by Hon. William Minor Lile, of the University of Virginia; an address on the "Kentucky Workmen's Compensation Act," by Robert C. Simmons, of Covington; a paper on "Interstate Subjects," by Edward W. Washington; and an address on "Some Great Lawyers of Kentucky" by Judge George Du Relle, of Louisville.

THE COLORADO BAR ASSOCIATION held its annual meeting at Colorado Springs, Colo., on July 10 and 11. The official program follows: President's address, by Henry A. Dubbs, of Denver; address by W. N. Searcy, of Durango, on "The Fourth Department of Government"; address by William V. Hodges, of Denver, on "Proceeds of Mining Operations—Capital or Income"; annual address by Charles Nagel, of St. Louis, Secretary of Commerce under President Taft, on "The Growth of Our Law"; address by John D. Fleming, of Boulder, on "Common Law and Code"; address by L. Ward Bannister, of Denver, on "The Question of the Federal Control of State Waters in the Priority States."

INDIANA STATE BAR ASSOCIATION.—The annual meeting of the Indiana State Bar Association was held at Indianapolis on July 8 and 9. Mayor Bell, of Indianapolis, welcomed the association to the city. The President's address, by John L. Rupe, of Richmond, was on the subject "The Indiana Taxation Laws." Papers were read by Stuart McKibbin, of South Bend, on "The Indiana Public Service Commission Law in Various Aspects"; by Clinton Rogers Woodruff, of Philadelphia, on "Constitutional Government and Municipal Life"; by Dan W. Sims, of Lafayette, on "The Employers' Liability Legislation of 1911"; and by Evans Woollen, of Indianapolis, on "The American Doctrine of Unconstitutionality." The annual address was delivered by Rowe G. Brown, of Minneapolis, his subject being "Muckraking the Constitution."

THE NORTH CAROLINA BAR ASSOCIATION held its sixteenth annual meeting at Wrightsville Beach, N. Car., on June 29, June 30 and July 1. President Thomas S. Rollins, of Asheville, delivered an address on "Our Bar Association." Other addresses were by Chief Justice Walter Clark, of the North Carolina Supreme Court on "Reform in Law and Legal Procedure"; by Rome G. Brown, of Minneapolis, Minn., on "Muckrakers of the Constitution"; and A. L. Brooks, of Greensboro, on "The Southern Lawyer, His Traditions and Opportunities." Officers were elected as follows: President, J. Crawford Biggs, Raleigh; first vice-president, Julius C. Martin, Asheville; second vice-president, Frank Nash, Hillsboro; third vice-president, Henry Gray, Clinton; secretary and treasurer, Thomas W. Davis, Wilmington.

CHANGES AMONG UNITED STATES ATTORNEYS.—Ashley N. Denton has been appointed assistant to United States District Attorney John E. Green, Jr., at Houston, Tex.—W. H. Rector, former assistant attorney general of Arkansas, has succeeded D. C. Simpson as assistant United States District Attorney at Little Rock, Ark.—Joseph B. Fleming has been appointed assistant United States District Attorney at Chicago.—F. H. Brown, of Somersworth, N. H., has been named as United States Attorney for New Hampshire.—Harry B. Tedrow, of Boulder, has been appointed to succeed Harry Eugene Kelly as United States District Attorney for Colorado.—Hugh R. Robertson has resigned as Mayor of Del Rio, Tex., to become assistant United States District Attorney with headquarters at San Antonio, Tex.

ALABAMA STATE BAR ASSOCIATION.—The annual meeting of the Alabama State Bar Association was held at Montgomery, Ala., on July 10 and 11. The official program prepared for the occasion was as follows: President's address, by Thomas M. Stevens; paper by W. R. Walker on "Legislative Power to Require Roads Worked without Compensation"; annual address by Robert C. Alston, of Atlanta, Ga., on "Andrew Johnson, President of these United States: His Part in the Reconstruction of the South and His Impeachment"; paper by William M. Blakey on "Some of the Pernicious Influences of the Common Law yet Existing in Our Law of Inheritance"; paper by Sam Will John on "Do the Bench and Bar Really Desire a Genuine Reformation of the Practice and Procedure in Our Courts?"

THE TENNESSEE STATE BAR ASSOCIATION held its thirty-third annual session at Nashville on June 11 and 12. John Bell Keeble, of Nashville, delivered the President's address. Other addresses were as follows: "Andrew Jackson, Soldier, Patriot, Statesman," by John B. Knox, of Anniston, Ala.; "What is the Status of the Ethics of the Bar?" by John T. Lellyett; "Plan for Modern Unified Courts," by Nathan William MacChesney, of Chicago; and "The Law Business of the United States," by James C. McReynolds, attorney general of the United States. The following are the newly elected officers: President, Harry H. Shelton, of Bristol; vice-president for West Tennessee, L. P. Mills, of Memphis; vice-president for Middle Tennessee, Frank M. Bass, of Nashville; vice-president for East Tennessee, A. W. Chambliss, of Chattanooga; secretary and treasurer, Charles H. Smith, of Knoxville.

GEORGIA BAR ASSOCIATION.—As stated in the last issue of LAW NOTES, the Georgia Bar Association met in annual convention at Tybee Island on June 18, 19 and 20. President Robert C. Alston, of Atlanta, delivered an address on "The Development of the Federal Constitution." Other addresses were as follows: "Woman Under the Law," by H. C. Peeples, of Atlanta; "Woodrow Wilson, a Georgia Lawyer," by P. C. McDuffie, of Atlanta; annual address on "The Court of Terror," by Judge Alexander Humphrey, of Louisville, Ky.; "A Judge and a Grand Jury," by Judge Walter G. Charlton, of Savannah; "The Emancipation of Woman," by Judge Joel I. Branham, of Rome; "The Circuit

Rider in the Blue Ridge," by C. J. Lilly, of Dahlonega; "The Circuit Rider in the Wire Grass," by H. E. Lawson, of Hawkinsville; "The Circuit Rider by the Sea," by R. D. Meader, of Brunswick; "The Circuit Rider in the Piney Woods," by T. S. Hawes, of Bainbridge.

DEATH OF JUDGE HORNBLOWER.—William Butler Hornblower, associate judge of the New York Court of Appeals, died at Litchfield, Conn., on June 16. Mr. Hornblower was born in Paterson, N. J., in 1851. He was graduated from Princeton in 1871, and four years later received the degree of bachelor of laws from the Columbia University Law School. In 1890, Governor Hill appointed him to the commission to propose amendments to the judiciary article of the New York Constitution. Shortly afterward Governor Hill became his bitter enemy and when, in 1893, President Cleveland nominated Mr. Hornblower as justice of the United States Supreme Court, Hill succeeded in defeating the nomination in the Senate. In 1904, Mr. Hornblower was appointed a member of the Board of Statutory Consolidation, which reported to the legislature the consolidated laws now in force in New York State. On February 2 last, Governor Glynn appointed Mr. Hornblower to the bench of the Court of Appeals.

JUSTICE LURTON DIES.—Associate Justice Horace Harmon Lurton, of the United States Supreme Court, died suddenly at Atlantic City, N. J., on July 12. He was seventy years old. His death creates the first vacancy in the Supreme Court during the Wilson administration. Justice Lurton was born at Newport, Campbell county, Ky. At the age of seventeen he enlisted in the Confederate army and served three years under General Morgan. Shortly before the close of the Civil War, he began studying law at Cumberland University, from which institution he was graduated in 1867. From 1874-87 he served as a Tennessee division chancellor, and in 1886 was elected a judge of the Tennessee Supreme Court, of which he became Chief Justice in 1893. The same year President Cleveland appointed him judge of the Sixth Judicial Circuit of the United States. On January 3, 1910, he became an associate justice of the United States Supreme Court, by appointment of President Taft, being the fourth Confederate soldier to become a member of the country's highest court.

THE NEW JERSEY STATE BAR ASSOCIATION met in annual session at Atlantic City, N. J., on June 12 and 13. The president's address was delivered by Attorney General John W. Wescott. Other addresses were made by Edward Cattell, statistical secretary to Mayor Blankenburg, of Philadelphia; by Brooks Adams, of Boston; by Francis D. Winston, United States District Attorney for North Carolina, whose subject was "The Spirit of North Carolina"; and by George W. Alger, of New York city, on "The Stopping Point in Legislation." The following officers were elected: President, George A. Bourgeois, Atlantic City; first vice-president, John A. Harden, Newark; second vice-president, Frederick W. Gnichtel, Trenton; third vice-president, Edward M. Colie, Newark; secretary, William J. Kraft, Camden; treasurer, Lewis Starr, Woodbury. Directors: First District, James M. E. Hildreth; Second District, Harvey F. Carr; Third District, Samuel Atkinson; Fourth District, Samuel Swackhammer; Fifth District, Nelson B. Gaskill; Sixth District, Theodore Simonson; Seventh District, Willard W. Cutter; Eighth District, Chauncey G. Parker; Ninth District, Maximilian T. Rosenberg.

THE PENNSYLVANIA BAR ASSOCIATION held its annual session at Erie, Pa., on June 30, July 1 and July 2. The subject of the President's address, which was delivered by Hampton L. Carson, of Philadelphia, was "The Evolution of the Independence of the Judiciary." The annual address was given by George W. Wickersham, of New York, former Attorney General of the United States, whose subject was "Government by Administrative Commission a Democratic Paradox." Papers were read by Louis Richards, of Reading, on "Jacob Rush and the Early Pennsylvania State Judiciary," and by T. S. Patterson, of Philadelphia, on "The Selection and Drawing of Jurors." At the annual banquet, Governor Tener responded to the toast "Pennsylvania," and Deputy Attorney General Hargest spoke on the subject "The Bar." The following officers were chosen for the ensuing year: President, H. J. Steele, of Northampton County; vice-presidents, Robert W. Irwin, Washington County; H. M. McClure, Union; A. J. Strauss, Luzerne; Louis Richards, Berks, and W. H. Keller, Lancaster; secretary, W. H. Staake, re-elected; treasurer, S. E. Basehere, re-elected. Executive Committee: O. B. Dickinson, Delaware; A. C. Cole, Clearfield; W. H. Challener, Allegheny; W. Rush Gillan, Franklin; R. A. Statz, Northampton; A. W. Johnson, Union; Casper Dull, Dauphin; F. J. Shoyer, Philadelphia; R. M. Speer, Venango; C. E. Sprout, Lycoming; H. B. Beitler, Philadelphia; A. B. Smith, Jr., Susquehanna; Don Rose, Allegheny; Paul Bedford, Luzerne; J. S. Rilling, Erie; H. W. Page, Philadelphia; Agnew Hill, Beaver; E. J. Cleveland, Bradford; H. E. Niles, York; Thomas H. Greevy, Blair, and John M. Ray, Cumberland.

IOWA STATE BAR ASSOCIATION.—The twentieth annual meeting of the Iowa State Bar Association was held at Burlington, Iowa, on June 25 and 26. W. E. Blake, president of the Des Moines County Bar Association, delivered an address of welcome which was responded to by Judge Jesse A. Miller, of Des Moines. The President's address was given by F. F. Dawley, of Cedar Rapids, his subject being "Relief for the Supreme Court." Prof. Roscoe Pound, of Harvard University, made the annual address on the subject "The Judicial Office in the United States." A paper on the "The Torrens Land Title System" was read by O. P. Myers, of Newton, and a memorial address on "Major John F. Lacey" was given by James A. Devitt, of Oskaloosa. Other speakers and their subjects were as follows: Maurice O'Connor, of Fort Dodge, on "The Relation of the Lawyer to the Public"; Henry W. Dunn, of the University of Iowa, on "A Word from the School Room"; Carl F. Jordan, of Cedar Rapids, on "Heard Out of Court"; L. G. Hurd, of Dubuque, on "The Absent"; and "Remarks," by C. E. Pickett, of Waterloo. A discussion of the subject "Disbarment of Attorneys" was led by Justice H. E. Deemer, of Red Oaks. The following officers were elected: President, F. F. Dawley, of Cedar Rapids; vice-president, A. N. Hobson, of West Union; secretary, H. C. Horack, of Iowa City; treasurer, Frank P. Nash, of Oskaloosa.

MICHIGAN STATE BAR ASSOCIATION.—The twenty-fourth annual meeting of the Michigan State Bar Association was held at Flint, Mich., on June 24 and 25. Mayor John R. MacDonald, of Flint, delivered a welcoming address. The response was by Judge Rollin H. Person, of Richmond, president of the association, who at the same time delivered his address as president. During the sessions, speeches were made as follows: "The Right of States to Provide for Substituted or Constructive Service as Affected by the Federal Constitution," by Hon. George W. Miller, of Chicago; "The Limits of Legislation," by Francis E. Baker, presiding judge of the United States Circuit Court of Appeals, Seventh District; "Oppressive Garnishments and Their Relief—Title Contracts," by Glen R. Faling, of Kalamazoo. The following officers were elected: President, John J. Carton, Flint; vice-president, William L. Carpenter, Detroit; secretary, Harry A.

Silsbee, Lansing; treasurer, William E. Brown, Lapeer. Directors, First congressional district, John W. Beaumont, Detroit; second, M. J. Cavanaugh, Ann Arbor; third, Burritt Hamilton, Battle Creek; fourth, W. W. Potter, Hastings; fifth, Colin Campbell, Grand Rapids; sixth, George W. Cook, Flint; seventh, William M. Smith, St. Johns; eighth, Lincoln Avery, Port Huron; ninth, John Q. Ross, Muskegon; tenth, Louis J. Weadock, Bay City; eleventh, Francis M. McNamara, Mount Pleasant; twelfth, Robert P. Hudson, Sault Ste. Marie; thirteenth, Harry Lockwood, Detroit.

THE MARYLAND STATE BAR ASSOCIATION held its nineteenth annual meeting at Cape May, N. J., on July 1, 2 and 3. The greetings of New Jersey were extended to the association by Judge John W. Wescott, Attorney General of the state. The President's address was delivered by Judge Walter I. Dawkins of the Supreme Bench of Baltimore. Other addresses were as follows: "Divorce—Is it a Menace or a Remedy?" by Henry M. McCullough of Elkton; annual address by Edgar M. Cullen, formerly Chief Justice of the New York Court of Appeals, on "The People and the Law"; "Government under Written Constitution," by William L. Rawle of Baltimore; "The Law and the Government," by United States Senator James Hamilton Lewis of Illinois. Officers for the ensuing year were elected as follows: President—Judge N. Charles Burke, of Baltimore county; vice-presidents—First Circuit, Judge Rodley D. Jones, of Snow Hill; Second Circuit, Frederick T. Haines, Elkton; Third Circuit, Judge William T. Harlan, of Belair; Fourth Circuit, Ferdinand Williams, of Cumberland; Fifth Circuit, Daniel M. Murray, of Ellicott City; Sixth Circuit, Arthur D. Willard, of Frederick; Seventh Circuit, M. Hampton Magruder, of Upper Marlboro; Eighth Circuit, Alfred S. Niles and Edward Guest Gibson of Baltimore city; secretary—James W. Chapman, Jr., of Baltimore city; treasurer—R. Bennett Darnall, of Baltimore city; executive council—Thomas H. Robinson, of Belair; F. Brooke Whiting, of Cumberland; Stuart S. Janney and Randolph Barton, Jr., of Baltimore city.

English Notes.

OFFENSES PUNISHABLE BY DEATH.—The question put by the deputy chairman at the Middlesex Sessions to a prisoner on conviction for coining, whether he realized that fifty years ago the offense of which he was found guilty was punishable by death, may well direct attention to the fact of the reduction, though by slow degrees, of the number of cases in which the punishment of death was inflicted, as it is evidence of the gradual growth of a sentiment which Sir Fitzjames Stephen thinks "very characteristic of our generation." When Blackstone wrote, there were no less than 160 offenses in England punishable with death, and it was a very ordinary occurrence for ten or twelve culprits to be hanged on a single occasion, and for forty or fifty to be condemned at a single assize. In 1732 no less than seventy persons received sentence of death at the Old Bailey, and in the same year we find no less than eighteen persons hanged in one day in Cork, then a not very considerable town. The only offenses now punishable with death are treason, murder, piracy with violence, and setting fire to dock-yards and arsenals.

THE TRIAL OF PEERS.—In a recent trial counsel for one of the defendants, in alluding to the fact that the name of a peer had been mentioned very prominently in relation to some of the proceedings, laid stress on the fact that if the peer had been brought to trial he would have been tried by the House of Peers and not by a judge and jury. Peers, no doubt, in cases of treason-felony or misprision of treason are entitled to "tryal of nobility"—that is to say, on an indictment found by a grand jury they are tried by the House of Peers and, if Parliament be not sitting, by the Court of the Lord High Steward, to which by statute every peer of full age must be summoned. In the cases, however, of misdemeanors peers are tried in the ordinary manner by common juries. Thus in the last decade of the eighteenth century the Earl of Abington was tried before Lord Kenyon and a common jury for libel. His claim to be permitted to wear his hat during the trial was disallowed by the court, and he was sentenced to undergo a term of imprisonment and to pay a fine. In recent times there have been several cases of the trial of peers by the House of Lords, notably the trials of Lord Ferrers for murder, of Lord Byron for murder, of the Duchess of Kingston for bigamy, of Lord Cardigan for duelling, and of Earl Russell for bigamy. There were in the eighteenth century three trials by the Irish House of Lords of peers for murder—the trials of Lord Santry, Lord Netterville, and the Earl of Kingston.

FRENCH VIEWS ON AERIAL RIGHTS.—The first chamber of the Tribunal Civil in Paris, presided over by M. Monier, has given judgment in the action of damages raised by M. Heurtebrise, the proprietor of Villaray Farm, situate between Buc and Chateaufort, against the firms Esnault-Pelterie, Farman, and Borel, whose aerodromes form around the farm a sort of belt, says the *Law Times*. M. Heurtebrise complained that the numerous aerial flights above his cultivated lands were prejudicial to his interests. The court decided in favor of M. Heurtebrise, the following passages from the judgment showing the views of the French judges on the question of aerial rights: "Whereas if in terms of the texts cited ownership of the soil carries with it effectively ownership above the soil, this principle must restrict itself reasonably to the advantage of the proprietor, according to the height in the air usable by him either in the way of buildings or accessories of buildings, such as architects and engineers can conceive and realize, or from the standpoint of cultivated land generally. As to that which is above this height—estimated and fixed according to knowledge or experience deduced from usage, common sense, scientific rules, and the special circumstances of each case—the freedom of the air is complete and the *circulation aérienne* is in the present state of the law free from all restraint, and should not call forth new claims on the part of the proprietors of lands over which flights take place." The court found that in the case under consideration the flights had taken place at an insufficient altitude, and condemned MM. Esnault-Pelterie and Farman each to pay to M. Heurtebrise 1000 francs (£40). The damages against M. Borel were assessed at 500 francs (£20).

EFFECT OF BANKRUPTCY OF MEMBER OF PARLIAMENT.—The resignation of a member of Parliament, on account of threatened bankruptcy proceedings for the nonpayment of the costs of an election petition, recalls the fact that all members of Parliament are not subject to the same disqualification arising from this cause. On this matter Ireland has legislation of its own. In England, under the Bankruptcy Act 1883, s. 32, and § 9 of the amending Act of 1890, a person adjudged a bankrupt in England is disqualified from sitting and voting in the House of Commons for five years, unless he "has obtained from the court

his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part." A further proviso in the same clause declares that the disqualification imposed by it shall apply to every part of the United Kingdom, a provision which has given rise in some quarters to the notion that the section applies to Ireland. This is not so, but its effect is to make an English bankrupt ineligible for an Irish seat unless where the certificate is obtained. In Ireland, on the other hand, where a person "who is a member of the Commons House of Parliament is adjudged bankrupt," he is disqualified from sitting and voting for one year from the date of the order of adjudication, "unless within the time the order is annulled or the debts paid in full." This is under the Bankruptcy (Ireland) Amendment Act 1872. The meaning is a little obscure, but the effect apparently is that sitting or voting after the adjudication is unlawful unless and until the order is annulled or the debts paid, though in four cases within the last twenty years the bankrupts voted steadily during the whole twelve months. At the end of the period the seat is declared vacant, and a new writ of election is issued. It is very curious that the law in the two countries should be so different, and there is some reason for thinking that the draftsman of the Act of 1883 believed he was laying down a uniform code for the United Kingdom, which he clearly did not do.

GIFT BY TESTATOR OF PROPERTY NOT BELONGING TO HIM.—To the uninitiated, a gift by a testator of what does not belong to him merely suggests a mistake and a gift which cannot take effect. To the lawyer, however, another question at once presents itself: Must the owner of the property so expressed to be given confirm the gift under the doctrine of election on pain of forfeiting some benefit under the will? If he chooses, he can, of course, say that the testator has purported to deal with his property and that he will not allow it to be affected by the will. If he could not say this, a person could deal with other people's property without their consent. If, however, he wishes to take under the will, he must either confirm the attempted gift or compensate the persons whom the testator intended to benefit by the gift of his property. The recent case of *Re* Williams; Cunliffe *v.* Williams (110 L. T. Rep. 569) is a curious illustration of this rule. A husband there had mortgaged his wife's property and then by his will gave her a life interest in all his real and leasehold property, and after her death specifically dealt with the mortgaged property, and bequeathed the residue of his estate to his wife charged with his debts and funeral and testamentary expenses. Now, the wife could at her husband's death have repudiated the mortgage and claimed that she was entitled to the property comprised in it, free from it. Equity, however, stepped in and said that, if she did so, she must compensate the persons who would have benefited under the will if its expressed provisions had been carried out. Under Locke King's Act any property of the deceased charged with payment of any money has prima facie to bear the burden of the charge. It was accordingly argued that as the testator had dealt with this property as his own, the rule must apply, but Mr. Justice Eve decided that what the wife had to bring in under her election was the interest to which she was entitled at her husband's death—that was, the property free from the incumbrance. But though it was thus not subject to the provisions of Locke King's Act and the incumbrance created by the husband could not be treated as specifically charged on it, it had to be regarded by the doctrine of election as part of the husband's estate unincumbered at his death, and had to contribute pari passu with his other property to the discharge of his debts.

THE MASTER OF THE ROLLS.—The conferring of a peerage on the Right Hon. Sir Herbert Cozens-Hardy, the Master of the Rolls, draws attention to the fact that in recent times the holder of the great office of Master of the Rolls has not infrequently been a peer. Lords Langdale, Romilly, Esher, and Alverstone were all when Masters of the Rolls peers of the realm. To the legal historian, however, the Mastership of the Rolls is inseparably associated in recollection with the House of Commons. The offices of Speaker of the House of Commons and Master of the Rolls were so frequently held in conjunction that the robes of the Speaker of the House of Commons of the present day are almost identical with the robes of the Master of the Rolls. Till the passing of the Judicature Act in 1873 the holder of the office of Master of the Rolls was eligible to be elected to sit and to vote in the House of Commons, and even after the passing of the Judicature Act the Master of the Rolls of the day—Sir George Jessel—was specially excepted from Parlimentary disability. It is an open secret that he desired to sit in the House of Commons as Master of the Rolls for the University of London, but abandoned that object of ambition in deference to the counsels of friends on whose advice he relied. On the 1st of June, 1853, the third reading of a bill for the exclusion from the House of Commons of the Master of the Rolls was defeated by 244 votes to 123 by the eloquence of Mr. (Lord) Macaulay. "The office of Master of the Rolls," he said, "and the House of Commons commenced their existence, I think, in the same generation—certainly in the same century. During six hundred years the Master of the Rolls has been eligible for a seat in this House. To go back no further than the time of the Hanoverian Succession, we have had amongst the most distinguished members of this House a succession of Masters of the Rolls—Sir Joseph Jekyll, Strange, Kenyon, Pepper Arden, Sir William Grant, Sir John Leach, Sir John Copley, Sir Charles Pepys, and Sir John Romilly. Is it pretended that in any one case any one of those eminent judges ever in any respect discharged his judicial duties less efficiently because he was admitted to a seat in this House?" After the lapse of twenty years the act which created the Supreme Court of Judicature gave effect to the policy of the exclusion from the House of Commons of the Master of the Rolls. The clause providing for that exclusion was carried through the Parliament of 1873 without opposition and without discussion. "Clauses 9 to 11 inclusive agreed to" is the sole notice which Hansard takes of the proceedings which reversed the decision of 1853. The Master of the Rolls in Ireland has been excluded from the House of Commons since 1821: (1 & 2 Geo. 4, c. 44).

SIR FREDERICK POLLOCK AND HIS FAMILY.—Sir Frederick Pollock's appointment as judge of the Courts of the Cinque Ports recalls the large place members of the family to which he belongs have occupied in the legal world during the last fifty or sixty years. In the Pollock family as in that of the Chittys in England, in the same way as in the Scottish families of Dundas and Moncreiff, law seems to run in the blood—each of these families having had an abnormally large number of representatives who have attained prominence in the profession. Sir Frederick Pollock's grandfather was Chief Baron of the Exchequer, his grand-uncle was Chief Justice of Bombay, one of his uncles was Baron Pollock (the last of the Barons), his father was Queen's Remembrancer and master, two of his uncles also became masters, while another is one of the present official referees. In addition to this record of those who have reached official legal positions, a very large number of his relatives are members of the Bar, two of them being King's Counsel. Like so many of the others, Sir Frederick Pollock has held divers official posts—

he was Professor of Jurisprudence in the University of Oxford for many years, and, as is well known, he is, and has been since 1895 editor of the Law Reports—but it is in the field of legal authorship that he has made his name widely known. Inheriting his father's literary interests and aptitudes, he has shown how even legal treatises need not be dull compilations, but may be written with a lettered grace and arranged in such a way as to prove highly attractive to their readers. How interesting as well as how useful his text-books have proved—notably his volumes on Contracts and Torts—is amply shown by the frequency with which new editions are called for. In this connection it is curious, in view of the large part played by text-books in modern legal education, to recall that Sir Frederick, in one of his books, mentions that, when he was entering on the study of the law, his grandfather, the Chief Baron, told him that he read no text-books, but always studied the reports. Nowadays text-books are indispensable, and if anyone more than another has given them a more assured position it has been Sir Frederick Pollock. Although, of course, best known in the profession by his standard volumes on Contracts and Torts, and by his collaboration in such works as the History of English Law and Possession in the Common Law, he has written much else both in prose and verse—his amusing Leading Cases done into English represent his incursion into metrical composition—and it is interesting to note that his contributions to literature have by no means been confined to legal topics. A work on Spinoza shows his interest in philosophy, while, on the other hand, his part in the Badminton volume on mountaineering recalls his old association with the Alpine Club.

Obiter Dicta.

DOWN ON GOLF.—State *v.* Caddy, 15 S. Dak. 167.

A CLIMATIC CONTROVERSY.—Snow *v.* Frye, 34 Okla. 826.

INSPECTION NECESSARY.—Inspection Bureau *v.* Everwear Hosiery Co., 152 Wis. 73.

PATENT MEDICINES.—"Due diligence and culpable negligence are each a compound in the manufacture of which the jury have exclusive proprietary rights."—*Per* Russell, J., in Gay *v.* Gay, 8 Ga. App. 804.

GOT HIS!—In Slam *v.* Lake Superior Terminal, etc., R. Co., 152 Wis. 426, the plaintiff was slammed by a string of moving cars and also by the trial court. The appellate court, however, stopped the slamming process.

THE ART OF STATUTE DRAFTING.—The Tariff Act of 1913 in providing for the distillation of alcohol for denaturalization gives this privilege to "any farmer," "any fruit grower" "or any other person or persons."

APPROPRIATE.—A correspondent says that the only point decided in Lott *v.* Graves, 67 Ala. 40, was that a husband is under legal obligation to bury his deceased wife, and pay the funeral expenses out of his own funds.

HUBBY.—Where a married woman, joined by her hubby, sues on a note which is her separate property, what her hubby owes the defendant cannot be set off against her demand. So says the supreme court of Texas in the case of Hubby *v.* Camplin, 22 Tex. 582.

SO RESPECTFUL.—The Wooster (Ohio) *News* of June 16 contained the following headline in big black letters: "Respected Landmark Dies Mon." Reading down the column, it was found to contain the news of the death of a prominent lawyer on the preceding Monday evening.

WHAT'S IN A NAME?—"The witness Lottie Whitehead upon further examination by the defendant's attorney testified: 'The baby is red headed and I am red headed. I have one brother, Jim, and one sister, who are red headed.'" See Whitehead *v.* State, (Tex.) 137 S.W. 367.

AN INARTISTIC JUDGE.—In Star Co. *v.* Press Publishing Co., 147 N. Y. Supp, 579, Judge Scott of the Appellate Division of the New York Supreme Court reveals a singular lack of appreciation of true art. This is how he prefaces his opinion: "The plaintiff and defendant corporation both publish newspapers, and may be said to be rivals in business in the sense that they appeal to similar constituencies, and adopt similar methods to attract readers. Each publishes a Sunday edition, composed in part of what is termed a comic supplement. For the Sunday comic supplement published by plaintiff Dirks has regularly contributed for a number of years a series of horrible, but apparently popular, drawings representing the supposititious experiences, in varying surroundings of certain nondescripts known as the Katzenjammer Kids."

CRUEL AND INHUMAN TREATMENT.—In Short *v.* Short, 62 Oregon 118, an action for divorce, on the ground of desertion, the defendant wife pleaded in defense that her husband had subjected her to so many indignities that she could not live with him. Among these indignities, we note particularly the following, which was perpetrated the day after the wedding: "The bridal party with relatives were on their way to Crater Lake. The day was hot, the road dusty, and the bride thirsty. Preferring cool lager, right off the ice, to the contents of the old oaken bucket, with its accompanying possibilities of bacteria and noxious germs, somebody suggested that a case of beer be procured at a wayside saloon. The groom made decided objections." The court says that the wife should have "tried to worry along on well water." We respectfully dissent and maintain that the defense of "cruel and inhuman treatment" was established.

AN IDEAL SERMON.—"It appears in this case that one Herman Maki incautiously entered a saloon in Superior, one evening in July, 1911, upon the invitation of an affable stranger. He had $875 in large bills in a large pocketbook on his person at the time, which was the fruit of ten years of honest toil. He drank

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with the stranger and with others in the saloon and retained no recollection of the stirring events of the evening after the second or third drink. When he again realized the responsibilities of life, he found himself wandering aimlessly upon the railroad tracks in the vicinity of the saloon in the cold gray dawn of the morning after, minus coat, vest, money, and watch. If this were a sermon we might well stop here, but inasmuch as it is an opinion we must proceed to consider the subsequent legal proceedings growing out of this unfortunate occurrence." *Per* Winslow, C. J., in Kaukonen *v.* State, 152 Wis. 518. A good short story indeed, and with a well pointed moral. But the learned Chief Justice falls into one error. If there is any preacher living who could preach as good a sermon as that and then stop, we have never heard of him.

A HOT AIR BRIEF?—Commenting on the brief of the appellant in Harris *v.* Security Life Ins. Co., 248 Mo. 315, Judge Bond of the Missouri Supreme Court says: "We do not understand the learned counsel for appellant to deny the fact that the rule formulated above is supported by 'the great weight of latter day authority in this country' (Appellant's brief, p. 29), but we gather from their brief that they are content to assail the proposition by characterizing the reasoning of the courts as being 'more specious than sound,' 'at variance with good morals,' 'sophistry,' and inconsistent with the 'Decalogue.' This method of assailing the logic of the decisions of the courts, if it be lacking in demonstrative force or constructive reasoning, may have the merit, at least, of reflecting the temper and taste of the writers. Possibly the great judgments of the great judges cited above will not be wholly dissolved by an irruption so slight and so entirely free from every element of dialectical reasoning or any form of logical disproof. We are inclined to indulge this hope when we bear in mind that the demolition of this great consensus of judicial conclusion is attempted, only by the use of the particular aerial force which is said to have overthrown the walls of Jericho." Turning to the 20th verse of the 6th Chapter of Joshua, we find the following brief account of the fall of Jericho: "So the people shouted when the priests blew with the trumpets: and it came to pass, when the people heard the sound of the trumpet, and the people shouted with a great shout, that the wall fell down flat, so that the people went up into the city, every man straight before him, and they took the city."

ORATORY FROM THE BENCH.—"This case illustrates the debasing and depraving effect of illicit love. Both sacred and profane history furnish many examples showing that illicit love is a most powerful motive for, and fruitful source of assassination. The blackest pages in English history grew out of the illicit loves of Henry the Eighth. The case of David and Uriah's wife shows to what treachery and degradations illicit love will reduce those who permit it to find lodgment in their hearts, and to pollute their lives. Pure love is the cause of all self-sacrifice, and the mainspring of all that is noble among the achievements of men. It is like fire taken from off the altar of Heaven. It purifies, ennobles, and lifts men up, and makes them nearer to and more like their God. It is indeed the emotion that sums all bliss; the springhead of all felicity; the silken down of happiness complete: the sparkling cream of all time's blessedness; the center to which all human beings gravitate; the emblem of God. It has been well said:

> 'Who happy and not eloquent of love?
> Who pure and as it is true,
> Not a temple where its glory ever dwells,
> Where burn its fires and beams its perfect eye?'

Illicit love is exactly the reverse of all this. The imagination cannot conceive and language cannot describe the blackness and despair, the degradation, shame, misery, suffering, and woe which it brings to the innocent as well as to the guilty. It is like fire taken from the very furnace of hell. It burns up, consumes, and destroys all that is pure and noble in the hearts of men and women. It sinks them beneath the level of brutes. It involves them in unutterable infamy in this world, and prepares them only for perdition in the life beyond the grave."—Per Furman, J., in Burns *v.* State, 8 Okla. Crim. 568.

JUDICIAL NOTICE OF ORDINANCES.—We have noticed from time to time the impatience with which our good friend, Judge Lamm of Missouri, views some of the time-worn but ridiculous rules of the law. It seems as if he held in just as long as possible, and then the explosion came. By the way of illustration, we call attention to some comparatively recent remarks of his respecting the matter of judicial notice, concerning which the courts have from time immemorial laid down the most absurd doctrines imaginable. He says: "Do appellate courts take judicial notice of town ordinances? They do not (Cox *v.* St. Louis, 11 Mo. 431) neither do trial courts (St. Louis *v.* Henning, 235 Mo. 1, c. 52). We are told that Sir John Falstaff in a blazing encounter of wit with Prince Henry speaks of 'old father antic the law.' [King Henry IV., pt. I, Act I, sc. 2.] Whether the alleged reporter of his alleged waggery and wisdom (who had indeed 'a mighty trick of saying things') got his cue anent *father antic* from the fact that every man is presumed to know the law (except, possibly, the judge who expounds it), and from the other fact that every inhabitant of a town is presumed to know its ordinances (Boonville ex rel. *v.* Stephens, 238 Mo. 1, c. 357) except the judge who tries an offender for breaching them, will never be known—but the possibility is attractive even to a sober judicial mind. 'Whatever of incongruity' (says Brown, C., in St. Louis, *v.* Henning, 235 Mo. 1, c. 51-2) 'there may be in a rule which creates a conclusive presumption that the wandering vagrant who sojourns for a day in St. Louis knows more of its local laws than the court which, by its judgment, affords him rest and refreshment in the city prison, has become unimportant in view of a uniform line of decisions of this court.'"—See St. Louis *v.* Young, 248 Mo. 346.

"There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of serving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." Harlin, J. Jacobson *v.* Massachusetts, 197 U. S. 29.

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Law Notes

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Martial Law.

THE god of war in all his dread accoutrements stalks forth upon the field of Europe. And now

> "The mailed Mars shall on his altar sit
> Up to his ears in blood,"

As Mars advances Minerva discreetly and modestly withdraws. In the wide areas that will be covered by the tremendous conflict martial law will replace civil law, and the inhabitants of these areas will have a poignant realization of how much more benignant the goddess of justice appears when she holds the scales than when she wields the flaming sword. For martial law, as Lord Wellington said, means no law at all. It is neither more nor less than the will of the general of the army. "Martial law," said Chief Justice Waite in *U. S.* v. *Dickelman,* 92 U. S. 520, "is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed." The nature and effect of martial law are concisely pointed out by Mr. Justice Nelson, in the case of *In re Egan,* 5 Blatchf. (U. S.) 319, Fed. Cas. No. 4303: "All respectable writers and publicists agree in the definition of martial law—that it is neither more nor less than the will of the general who commands the army. It overrides and suppresses all existing civil laws, civil officers and civil authorities, by the arbitrary exercise of military power; and every citizen or subject, in other words the entire population of the country, within the confines of its power, is subjected to the mere will or caprice of the commander. He holds the lives, liberty and property of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge and executioner. His order to the provost-marshal is the beginning and the end of the trial and condemnation of the accused. There may be a hearing, or not, at his will. If permitted, it may be before a drum-head court martial, or the more formal board of a military commission, or both forms may be dispensed with, and the trial and condemnation be equally legal, though not equally humane and judicious."

There is a broad distinction between "martial law" and "military law," as there is also between "martial law" and "military government," although the terms are often carelessly used as meaning the same thing. "Military law" is the code of rules enacted for the government of the army and navy, and necessarily applies only to persons in the military or naval service, and not to civilians. "Military government" is the dominion exercised in war over the territory and inhabitants of an enemy's country upon its conquest and occupation; while "martial law" has been described to be "the suspension of all law but the will of the military commanders intrusted with its execution, to be exercised according to their judgment, the exigencies of the moment, and the usages of the service, with no fixed or settled rules or laws, no definite practice, and not bound even by the rules of ordinary military law."

Moratory Laws.

UNDER stress of the conditions brought on by the European war England has been compelled to declare a limited moratorium. France has taken similar action, and a number of other countries will doubtless follow suit. The word "moratorium," according to the New International Encyclopædia, comes from the Latin *mora* (delay) and is defined in that work as "an extraordinary act of a government, by which the collection of all debts is suspended for a specified time." This device was used in Argentina in 1890, at the time of the great financial crisis which led to the suspension of the Barings of London. A more recent instance is the moratorium declared in Mexico. France has frequently resorted to the device, notably in the Franco-Prussian War. England has succeeded in averting a moratorium for almost a century, since 1815, when Napoleon brought commercial paralysis upon all Europe. Under the present British declaration wages, salaries, rates and taxes, government payments and national insurance transactions are not to come within the scope of the moratorium.

The international validity of the moratorium has been established by the French courts. These will doubtless be followed by the courts of other countries, so that no international complications are likely to arise by reason of the temporary financial amnesty.

Contraband of War.

IF the present European war proves a protracted one many disputes are likely to arise between the United States and the warring powers concerning contraband of war. The trade of neutrals with belligerents in articles not contraband is, of course, absolutely free unless interrupted by blockade; but shipments by neutrals to belligerents of contraband articles are, under well-settled principles of international law, unlawful, and may be seized during transit by sea. "The transportation of contraband articles to one of the belligerents," says the court in *The Sloop Ralph,* 39 Ct. Cl. 204, "is in itself an

assault for the time being upon the other belligerents, in the fact that it may furnish them with the weapons of war and thereby increase the resources of their power as against their adversary; and for that reason, upon the broad ground of self-preservation incident to nations as well as individuals, the parties against whom the quasi assault is made have the right to defend themselves against the threatened blow by seizing the weapon before it reaches the possession and control of their enemy."

Contraband of war is apparently not susceptible of precise definition as applied to every species of merchandise. For ascertainment of that which may be characterized as contraband, the United States Supreme Court has divided articles of merchandise into three classes: "The first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege." The Peterhoff, 72 U. S. 28, 18 L. ed. 564. This classification corresponds roughly with that made by the London Naval Conference of 1908-1909, which agreed upon twenty-three Articles relating to contraband of war. Articles of merchandise falling within the first class, and which are known as "absolute contraband," are arms and munitions of war, clothing and equipment of a distinctively military character, saddle, draught, and pack animals suitable for use in war, and, generally, all articles and materials which are exclusively used for war. In the second class are such articles as foodstuffs and fuel, clothing, money and bullion, and railway and telegraph material. These are "conditionally contraband," and subject to seizure only when destined for the use of armed forces. In the third class fall the articles which are not susceptible of use in war and cannot be regarded as contraband under any conditions. Such are raw materials of the textile industries, raw hides, ores, paper, chinaware and glass, machinery and furniture. Nearly all the disputes concerning contraband of war have related to the second class of articles—those conditionally contraband, the question in each case being whether the articles were destined for hostile use or were to be used by the people of the belligerent nation in their peaceful avocations. In the past it has been common for warring powers to issue orders specifying the articles that were to be considered contraband. Both Russia and Japan did this in the Russo-Japanese War, as did also the United States in the Spanish-American War. England has done so in the present war. The lists of contraband thus promulgated, however, have, in the main, followed the general classification heretofore pointed out.

American Registry of Foreign-built Ships.

A BILL has passed Congress and has been signed by the President which is designed to take away the limitation against admitting foreign-built vessels over five years old to American registry. The purpose of the measure is, of course, to give the shipping interests in this country an opportunity to buy foreign ships to meet the commercial exigencies created by the European war. In the discussion upon the bill in the House it was suggested that the purchase by American citizens of ships owned by citizens of any of the belligerent powers might lead to violations of neutrality, and involve the United States in a European dispute. The rule of decision in some countries has been that, as to a vessel, no change of ownership during hostilities can be regarded in a prize court. In England and the United States, however, the strictness of this rule is not observed. English and American admiralty courts have always recognized the right of neutrals to purchase the ships of belligerents, provided that the sales are absolute and unconditional and not mere transfers made only to cover the property during the war. *The Bernon,* 1 C. Rob. (Reprint) 86; *The Jemmy,* 4 C. Rob. (Reprint) 26; *The Sechs Geschwistern,* 4 C. Rob. (Reprint) 82; *The Omnibus,* 6 C. Rob. (Reprint) 71; *U. S.* v. *Brig Lilla,* 2 Cliff. (U. S.) 169; *The Benito Estenger,* 176 U. S. 568. "The purchase of an enemy's vessel in a neutral port during war, and while active hostilities are raging," says the court in *U. S.* v. *Brig Lilla,* 2 Cliff. (U. S.) 169, "is itself a suspicious circumstance, and whenever such a purchase is drawn in question, the evidence of an absolute and bona fide transfer ought to be clearly established. Neutrals may purchase an enemy's ship, but such purchases are liable to great suspicion, and if good proof be not given of their validity, by bill of sale and payment of a valuable consideration, it will materially impair the validity of the neutral claim." In *The Sechs Geschwistern,* 4 C. Rob. (Reprint) 82, Sir William Scott, of the High Court of Admiralty of England, said: "This is the case of a ship asserted to have been purchased of the enemy; a liberty which this country has not denied to neutral merchants, though by the regulation of France it is entirely forbidden. The rule which this country has been content to apply is, that property so transferred must be bona fide and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest vitiates a contract of this description altogether." In *The Jemmy,* 4 C. Rob. (Reprint) 26, the same eminent authority said: "This case has been admitted to farther proof, owing entirely to the suppression of a circumstance, which, if the court had known, it would not have permitted farther proof to have been introduced; namely, that the ship has been left in the trade and under the management of the former owner. Wherever that fact appears, the court will hold it to be conclusive, because, from the *evidentia rei,* the strongest presumption necessarily arises that it is merely a covered and pretended transfer. The presumption is so strong, that scarcely any proof can avail against it. It is a rule which the court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship, and yet retain the management of it, as a neutral vessel, it would be impossible for the court to protect itself against frauds."

It will thus be seen that a mere temporary transfer of foreign vessels to the American flag might easily bring about complications with foreign countries. Absolute and unconditional purchases of foreign vessels, however, should be reasonably safe. And perhaps a wholesale pur-

chase of foreign-owned ships is at present the most available means of building up a merchant marine in this country. The present need for ships on this side of the water is urgent. The war will make increased demands for our shipments, and many of the foreign bottoms in which our commerce has been carried have now been requisitioned by their several governments for war service.

The Caillaux Trial.

To one familiar with the dignified and orderly procedure of English and American courts, the recent Caillaux trial in Paris must have seemed like a piece of opéra bouffe. The declamatory stump speeches of the attorneys and witnesses, the altercations of the judges, the unchecked applause and hisses of the spectators, the mass of wholly irrelevant issues injected into the case, and the preposterous verdict in face of the evidence, were well calculated, certainly, to make the proceedings little short of grotesque to the view of one unfamiliar with French courts and with the Gallic character and temperament. At bottom, of course, the trial was simply the working out of the "unwritten law" after the French manner. To that law American courts have given frequent sanction. With us, however, it has seemed to be a sufficient stage setting for the court farce to have only the defendant insane. In France, as it would seem, an adequate *mise en scène* requires the entire court and those in attendance upon it to appear to be afflicted with brain-storms.

Race Segregation.

WHAT appears to have been the first effort to segregate whites and negroes in North Carolina has been overthrown by a decision of the Supreme Court of that state in the case of State v. Darnell, (N. C.) 81 S. E. 338, holding invalid an ordinance of a city which made it unlawful for any colored person to occupy as a residence any house upon any street on which a greater number of houses were occupied as residences by white people than were occupied as residences by colored people. The ordinance made a similar restriction against white people occupying as residences houses on streets where there were more houses occupied by colored residents than by whites. Such an ordinance, the court holds, is not authorized under the city charter provision that the aldermen "may pass any ordinance which they may deem wise and proper for the good order, good government or general welfare of the city, provided it does not contravene the laws and constitution of the state." In holding the ordinance to be an unreasonable exercise of the police power of the municipality, the court, speaking through Chief Justice Clark, says: "We do not think that the authority conferred by section 44 of the charter to enact ordinances for the 'general welfare of the city' can justly be construed as intended by the legislature to authorize an ordinance of this kind which establishes a public policy which has hitherto been unknown in the legislation of our state. To do so would give to the words 'general welfare' an extended and wholly unrestricted scope which we do not think the legislature could have contemplated in using those words. If the board of aldermen is hereby authorized to make this restriction, a bare majority of the board could, if they may 'deem it wise and proper,' require Republicans to live on certain streets, and Democrats on others, or that Protestants shall reside only in certain parts of the town, and Catholics in another, or that Germans or people of German descent should reside only where they were in the majority, and that Irish and those of Irish descent should dwell only in certain localities, designated for them by the arbitrary judgment and permission of a majority of the aldermen. They could apply the restriction as well to business occupations as to residences, and could prescribe the localities allotted to each class of people without reference to whether the majority already therein is of the prescribed race, nationality, or political or religious faith. Besides, an ordinance of this kind forbids the owner of property to sell or to lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from doing so where they can make the best bargain. Yet this right of disposing of property, the *jus disponendi,* has always been held one of the inalienable rights incident to the ownership of property which no statute will be construed as having power to take away."

Chief Justice Clark does not directly pass upon the question whether, if the legislature had enacted a statute conferring on municipal corporations the authority to pass such an ordinance as the one in question, the statute would have been constitutional. From what is said, however, as to the inalienable *jus disponendi* incident to the ownership of property, it is to be inferred that such a statute would meet the same fate at the hands of the North Carolina Supreme Court as has befallen the segregation ordinance.

RIOTING AS TREASON.

AN I. W. W. leader was recently arrested and lodged in jail in Ohio charged with treason. Some curiosity naturally arises as to what facts will be adduced to prove him guilty of this the highest crime known to the law. Under the old common law of England the acts against the sovereign and the government which constituted treason were both various and numerous. Under the Constitution of the United States, however, the crime of treason has been confined within a very narrow compass. It is the only crime that is defined in that instrument, and our fathers doubtless had in mind the tyranny of the English law upon the subject when they placed a rigid and limited definition of treason in the organic law. The constitutional provision reads: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." (U. S. Const. art. III., § 3.) Most if not all the states of the Union have similar provisions as to what constitutes treason against the state. In Ohio treason against the United States is made treason against the state. (Gen. Code 1910, § 12,392.) The language of the constitutional provision appears to have been borrowed from an ancient English statute, enacted in the year 1352 (25 Ed. III.), mainly for the purpose of restraining the power of the crown to oppress the subject by arbitrary constructions of the law of treason. See Judge Curtis's charge to the grand jury, 2 Curt. (U. S.) 630, 30 Fed. Cas. No. 18,269, wherein that learned jurist says: "At the time of the introduction of this language

into our constitution, it had acquired a settled meaning, and that meaning has been adopted by the courts of the United States when they have had occasion, as unfortunately they have had occasion, to interpret these words. This settled interpretation is, that the words 'levying war' include not only the act of making war for the purpose of entirely overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law in pursuance of such combination."

In consonance with the strictness with which treason has been defined in the Constitution the courts have not been disposed, as a rule, to give any latitudinarian interpretation of the language in which that definition is embodied. To constitute a "levying of war" within the meaning of the constitutional clause defining treason, there must be an assemblage of persons with force and arms to overthrow the government, or to resist the laws. *U. S.* v. *Greathouse,* 4 Sawy. (U. S.) 457, 26 Fed. Cas. No. 15,254.

An intention to commit treason, not carried out by the actual assembling of troops or the engaging or enlisting of men for levying war against the government, nor followed by the future embodying of such men, is not punishable as treason. *Burr's Trial,* 4 Cranch (U. S.) 455, 25 Fed. Cas. No. 14,692*a*. Nor is the assemblage of a body of men for the purpose of making war against the government an act of levying war unless it be a warlike assemblage, exhibiting the appearance of force, and in a condition to practice hostility. *U. S.* v. *Burr,* 25 Fed. Cas. No. 14,693. And resistance to the execution of a law of the United States, accompanied by any degree of force, if for a private purpose, is not treason. To constitute that offense the object of the resistance must be of a public and general character. *U. S.* v. *Hoxie,* 1 Paine (U. S.) 265, 26 Fed. Cas. No. 15,407; *U. S.* v. *Hanway,* 2 Wall. Jr. (C. C.) 139, 26 Fed. Cas. No. 15,299.

Under these interpretations of the constitutional provision it must be a subject of some conjecture how the ebullitions of the I. W. W., which have usually taken the form of riots and unlawful assemblies, will be brought within the constitutional definition of treason. The Ohio authorities may, however, have taken a leaf from the criminal records of Pennsylvania. At the time of the great Homestead strike in 1892, Chief Justice Paxson of the supreme court, having taken a seat, *ex-officio,* on the bench of the Allegheny county court of oyer and terminer, charged the grand jury with reference to the offense of treason laid in the bills of indictment against a number of the strikers. In the course of his charge (*The Homestead Case*, 1 Pa. Dist. 785) the chief justice said: "A mere mob, collected upon the impulse of the moment, without any definite object beyond the gratification of its sudden passions, does not commit treason although it destroys property and takes human life. But when a large number of men arm and organize themselves by divisions and companies, appoint officers, and engage in a common purpose to defy the law, to resist its officers, and to deprive any portion of their fellow-citizens of the rights to which they are entitled under the constitution and laws, it is a levying of war against the state, and the offense is treason. Much more so when the functions of the state government are usurped in a particular locality, the process of the commonwealth and the lawful acts of its officers resisted, and unlawful arrests made at the dictation of a body of men who have assumed the functions of the government in that locality. And it is a state of war when a business plant has to be surrounded by the army of the state for weeks to protect it from unlawful violence at the hands of men formerly employed in it. Where a body of men have organized for a treasonable purpose, every step which any one of them takes in part execution of their common purpose is an overt act of treason in levying war. Every member of such usurped government, whether it be an advisory committee, or by whatever name called, who has participated in such usurpation, who has joined in a common purpose of resistance to the law and the denial of the rights of other citizens, has committed treason against the state."

THE ADMINISTRATION OF JUSTICE.*

THE officers of your Association have paid me the very high compliment of asking me to address you at this your annual meeting; and I can think of no subject of more interest than that in which we are all concerned, The Administration of Justice. And, believe me, I am fully conscious of the great honor you have thus conferred upon me, however unworthy may be its recipient.

I have no intention in what may be said to hold up our methods, our Courts, as an example to be followed, much less to criticise your methods, your Courts or the results you may attain. My remarks will be mostly of a general character; but if there be found anywhere in them aught which will be helpful toward the ends we all have in common, I shall be glad.

It would seem that very shortly before historic times, man lived in anarchy, vindicating his rights and avenging his wrongs by his own strong right hand; when "wild in woods the noble savage ran," he knew no law but his own desires, no master but him who held him by force; everything was to him right that he liked, wrong was what he disliked. The unutterable cruelty and misery of those times may escape the poet, but never the sociologist or statesman.

When man began to be gregarious and formed clans and septs, it was soon recognized that no community could prosper whose only rule was the rule of might, where each was judge of what he was entitled to and was permitted to acquire and keep all he could. The desires of one crossing the desires of another, one must give way or be made to give way—the weaker slain or disabled by the stronger, by so much weakened the community and laid it the more open to conquest and destruction by other communities—while even if matters were not pushed to that extremity, the rankling sense of injustice which corroded the heart of him who had been forced to submit, was itself a deleterious element.

Accordingly it must early have been determined that conflicting interests of two members of the same community must be determined by an independent tribunal. At first, no doubt, the King or Priest—the words were long synonymous—the wise or kenning Elder—was the Judge. For long the Judge received inspiration from the god, not uncommonly the eponymous hero,

* Address delivered by Hon. William Renwick Riddell, Justice Supreme Court of Ontario, before the Illinois State Bar Association, at Chicago, May 28, 1914.

in each particular case, "every case was treated on its own merits," and the decision of the god was sought on the particular case without regard to general rule. The litigants receiving the judgment of the god, The Great Master, must needs be satisfied that what was said to them was as the Great Superior wished—He could always say *sic volo, sic jubeo, stat pro ratione voluntas.* Even when the doctrine of special inspiration grew shaky, the judge continued to adjudicate on the particular case before him almost if not quite irrespective of what he had decided in a previous case and with little or no thought of how he might decide in a subsequent, principle being far in the future.

Nor did this wholly cease to be the case when record or tradition gathered the "themistes" which had been pronounced, and a family or order of functionaries, priests—call them what you will—were the guardians of past judgments and considered as entrusted with knowledge of the will of the gods. Something like principle did indeed creep in—something approaching a general rule was gradually appreciated, but still there was not law in our modern sense.

That was practically the condition of the Indian when America was discovered (it is said "the Indians' had few laws but they were well violated"); and it is the condition of many tribes of so-called savages to-day. It is a great mistake to suppose that there is more litigation in Chicago or in Toronto in proportion to population than there was among the Iroquois or is among the wandering tribes of the desert. The difference is that in these, every law suit is a thing by itself, in those every law suit is connected with thousands of others which have preceded it. There is no satisfactory evidence of the advantage of one method over the other in doing substantial justice.

In ancient Athens principle did not quite make its way, did not do its perfect work. Much written law there was but more unwritten; and every citizen, every dicast, had his own view of what in reality was the law—in great measure what he wished to be law was law, and he decided accordingly.

It is the glory of the Roman civilization that thence arose the full theory of law as a principle, as a collection of binding precepts. The influence of Roman or Civil Law upon the whole judicial, legal concept of the modern world, it would not be easy to exaggerate.

Our Teutonic ancestors had their own law, cruel, illogical, tyrannical in many respects; but they were inordinately proud of it, and we, their descendants, are by instinct and education prone to look upon it with not much less pride than they.

The history of English civil law for over eight centuries has been in great measure a history of conflict between the crude law of the Teuton and the polished law of the Roman; the more civilized law, with but few set-backs, has been all the while acquiring a greater and greater ascendency. Now in England and in Ontario, where the rules of Equity and of Common Law conflict, the rules of Equity prevail; the rules of Equity which are practically all derived from the law of Rome.

From the earliest times, the tribunal to decide rights might be of a temporary character and *pro hac vice,* or it might be of a permanent or quasi-permanent nature. In the former case, however disguised, it was in substance a board of arbitration; in the latter, by whatever name it might be known, it was a court. The Court has grown upon the Board as a means of settling disputes, and is now triumphant; and whenever an arbitration is preferred to a Court decision it is a disgrace either to the substantive law, and therefore to the legislature, or to the practice, and therefore in most instances to the Courts—in every such instance the law has proved a failure and the Courts incompetent.

In international disputes indeed the progress just spoken of does not appear. When two nations do not determine their rights by the cannon and bayonet, by wounds and blood and death, by the elimination of the bravest and strongest, "wet eyes of widows, broken old mothers and the whole dark butchery without a soul," they have heretofore in most cases formed a temporary Board and left it to the Board to decide without any principle but "Get all you can, give up what you must." Too often it is found that the ape and tiger still survive in that jungle.

Within the nation, we of modern times have decided that our rights must be determined on principle—on principles that can be certainly known, for they can be expressed in writing.

In what I am now about to say, I speak in the main of civil litigation. I shall later on speak of criminal justice specially.

The function of the Court is to determine rights according to principle, that is, according to law; and from one point of view, in so far as it does that, in so far is it a success and no further.

It is not enough that the Court shall give litigants their rights according to law. The Court was invented to prevent strife by determination of right by and through a just and impartial referee; and unless it is believed that the Court is just and impartial, it fails in a most important part of its object and loses much of its value.

Moreover such a course should be pursued that those who have disputes shall be desirous of having them decided on principle; that is, the superiority of the professional agent of justice, the Court, should be manifest over the non-professional, the Board of Arbitration. The medical profession should feel no more regret at the prevalence of resort to the quack than the legal profession at prevalence of resort to arbitration.

The relative importance of two great ends of the administration of justice, that is, determination of right according to principle, and satisfying the public that justice is properly administered, may depend on circumstances. In a judgment of my own it was said: "all magistrates should remember that while the most important thing for them is to be impartial and right, it is not much less important that litigants and the public generally should believe in their impartiality and rectitude," *Rex* v. *McArthur* (1906), 8 O. W. R. 694. Nay, I am not at all sure that it is not sometimes more important that the litigants and the community shall think justice is being done than that the decision shall be strictly in accord with precedent. Not many years ago, in conversation with a retired Justice of the Supreme Court of the United States, I ventured to express the opinion that no harm would have accrued if two-thirds of the cases in that court had been decided the other way; he answered, "If you leave out the constitutional cases I should agree, and indeed I think you might increase the percentage considerably." The modesty of one not thoroughly acquainted with the Constitutions of the United States and of the States of the Union, one who lives in a country without a Constitution (and likes it), prevented me when speaking to an authority on these, from questioning my friend's exception. I venture, however, here to submit to you the consideration—what harm would have been done if Daniel Webster had failed in the Dartmouth College case? Your law would have been different, but would it have been worse? Is your law better for the people at large—and it is the people it must always have in its care—than if it were as in England and Ontario? Are even your corporations during the sittings of Congress and Legislature any more comfortable than ours or those in England? And after all, has the effect been much more than to oblige legislatures to introduce into private charters a clause reserving the power to repeal or alter them—just as it is said that practically the whole effect of the Statute of Uses was to introduce five words into conveyances?

Did the decisions, or either of them, on the constitutionality of taxation of incomes do any good? and would any harm have been done if they had been the other way? No constitutional amendment would have been necessary, but what of it? Would any one have been injured if he were validly taxed under the constitution as it stood, rather than under an amendment? And does it feel any more pleasant or hurt any less to pay an income tax than if it had been levied under the document of the Fathers?

Did the "Dred Scott" decision settle anything? Perhaps it hastened an inevitable conflict, but did it do more? Was the conflict not inevitable under any decision, and was it rendered less intense, costly, bloody, terrible by the decision actually given?

Most hesitatingly and meekly (as becomes an outsider) I venture to suggest to you that all the decisions of the Supreme Court are overborne in importance by the one decision of the Senate of the United States when that body refused to dismiss Andrew Johnson; for in all human probability there will never be another impeachment of a President of the United States for the reason that he does not agree with the majority of the people or of Congress; the President is as firmly seated on his throne and is as truly a monarch for the term for which he is elected as any king or emperor in Christendom. Benjamin Robbins Curtis' success before that tribunal was of vastly more significance and of vastly greater importance to the United States and its people than would have been the success in the Supreme Court when he delivered the superb dissenting judgment which will continue to be the greatest glory of his name as long as Courts endure and lawyers reason.

Does not the decision of the New York Court of Impeachment that a Governor of that State, their two year King, must behave himself according to their views of honesty and propriety before as well as after inauguration, overtop in importance the decision of the unconstitutionality of employers' liability legislation? Did this do more than call for an amendment, inevitable if the people wanted it? And what possible harm could have been done had the decision been the other way?

It is the regular and conventional thing to speak of the great principles of the common law as something sacrosanct; to say that the common law is the perfection of human reason. So far as these principles are identical with enlightened reason, with the teachings of the moral law, there can be no complaint. But how do they differ from Justinian's triad? *Præcepta juris sunt hæc. Honeste vivere, alterum non lædere, suum cuique tribuere.* The maxims of law are these, to live honorably, to injure no one, to give every one his due. Any principles outside of these, of what avail are they? And what harm if the rules laid down by the Courts had been different? The laws of real estate at the common law no civilized nation would now endure; in your country and in mine, the Legislature had to intervene so to change them as to make them consistent with common sense. What advantage is it that (or if) the laws of distress by landlord for rent be retained? Who would now lay down the "Rule in Shelley's Case?"

All that has been saved the common law is Legal Fiction, Equity and Legislation; and all our pity for those who did not inherit or adopt the common law of England, your fellow Americans in Louisiana, my fellow Canadians in Quebec would laugh at. Outside of the fundamental principles of honesty, there's nothing either good or bad in law but thinking makes it so; most of our admiration for the sages of the law, Bracton, Littleton, Coke, is as well founded as admiration of the middle age schoolmen and no more so. Extraordinary ability, profound learning, consummate subtlety, characterize both classes; but no one would be much the worse if they had devoted their attention to heraldry or the tracing of pedigrees; or if in eight out of ten cases they found the law diametrically opposite to what they did find.

Howbeit, for good or for ill, the law is in most instances settled; the rights of the people are to be determined according to fixed rules laid down either by binding decision or by legislative authority. The Court must necessarily be conservative; the Court has no more power to change the law as it finds it than to eliminate the word "not" from the commandments; the people are entitled to their law as it stands and must submit to it whether they like it or not. We probably all agree that (speaking generally) the very first consideration underlying, surrounding and going beyond all others, is that justice shall be done according to the existing law. If the people do not like the law let them change it, the Court cannot change it for them.

God forbid that any Court should be influenced in its judgment by the opinions of litigants or of any other person whomsoever. Circumstances may and often will be such that judgments will not only be unpopular, but they may even be repugnant to the sense of justice of the community; and yet the Court must give precisely these judgments.

But that does not imply that the Court should so act as to give rise to the impression among the people that it is wholly indifferent to a just public sentiment. Lord Mansfield could say: "I wish popularity," and he showed himself a good public servant when he said so, if a better when he added, "but it is that popularity which follows, not that which is run after, it is that popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means. . . *'Ego hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam putarem.'*" (I have always been of this opinion—that unpopularity gained by doing one's duty is a glory not a disgrace.)

Now justice is not administered in the abstract, it is justice to the litigant in the particular case that must be sought; and the one essential of a Court is that the law is administered in the particular cases brought before it.

A story is told of an importer who had been required to pay $800 as duty upon goods which he had brought in. He claimed that no duty was payable, and paid under protest. He brought his action which made its way by slow degrees to the Supreme Court. In that Court all the Judges gave learned opinions, but none said whether the unfortunate merchant was to have his money returned, and the Court was shocked to hear a troubled voice, "Do I get my $800?" *Se non è vero, è ben trovato.*

The Court is not (at least in my country) the master of the people, but their servant, supported by them for their own use and in their service; the judge is paid by the people to do their work, and just as soon as the Court is not worth, directly or indirectly, what it costs, it should be abolished—directly in adjudicating upon the rights of litigants, indirectly in preventing civil wrongs, turmoil, assaults, thefts, trespasses, in the time-honored phrase "maintaining the King's peace."

A Court does not exist for itself; it is not an end in itself. A Court is an evil and the less it is called into play the better for the community unless the evils arising from this course will be greater than those arising from the more frequent exercise of its functions.

When Congress was proposing to give American coasting vessels a privilege in the Panama Canal not granted to other ships, and Britain made a protest, basing her claims upon treaty (I am not going to discuss the rights and the wrongs of the matter, the American people are guardians of their own honor and need no advice or opinion from me or any other non-American), my friend of the United States Supreme Court said to me: "I hope that question will go to The Hague." I answered, "I hope

not;" and when he wonderingly asked why, I said, "I hope there will be no necessity, I hope that the nations will settle the matter without litigation, there is no saying what heart-burnings and discontents may arise over the decision; we in Canada still remember the Alaska Boundary Award, and no one has a right to expect a repetition of the extraordinary good fortune which followed the Fishery Award at The Hague the other day when each party claimed substantial victory. A settlement between the parties themselves is infinitely to be preferred to a reference or litigation of any kind." My friend was not wholly convinced; he was an American and consequently thought that "there is nothing like a court."

The court was made for man, not man for the court. No considerations of dignity, tradition, *esprit du corps* should ever induce a judge to forget that he is a servant of the people, paid by the people to do the people's work—if he fail to appreciate this elementary truth and to act upon it, he is apt to be an unfaithful servant, a dishonest recipient of wages paid for work which he fails to do. Fortunately this class of judge is rare; there is no "I Won't Work" association for them.

The Court does not exist for the exhibition of the personal dignity of the judge. Personal dignity in a judge may be a valuable asset to the community which he serves, it may help to preserve decorum and thereby advance public business; but it may be a detriment if of a certain kind. If the back be so stiff that it cannot bend itself to work, and if the business of the Court must be delayed because the judicial dignity craves twenty-three hours rest of the twenty-four, the public can very well manage to get along without it. And the dignity which is so concerned with looking for slights and "contempts of Court" that it has little time for anything else, is better placed elsewhere than on the bench. Let a judge do his work faithfully, promptly and courteously, and his dignity may generally be left to look after itself.

Tradition is sometimes of much value; but it is tradition of what is good and useful; a traditional method of doing business is convenient and not infrequently is the best available method; but a tradition, if there be one, of dilatoriness or inefficiency were better forgotten. What is old is not necessarily good, nor what is new, necessarily wrong.

Perhaps the most frequent complaint made anywhere of the administration of the law, is its delay—the law's delay. One of the promises wrung seven centuries ago from a reluctant king by a resolute aristocracy, was *Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam;* to none will we sell, to none will we deny or delay right or justice. He who delays justice, denies it—a truth profound though it lies on the very surface, patent and obvious, so patent and obvious indeed that it is often overlooked.

A very short time ago I read an able article by an eminent judge of one of the United States, in which he said that delay if not too long is a good thing in litigation. I then absolutely repudiated that doctrine, as I do now; I assert most confidently that every unnecessary delay is wrong if not asked for by the parties concerned. The ideal method of determining rights would be for the parties when difficulties arose, at once to lay the facts before a judge and have an immediate decision. We in Ontario have that method in substance where there are no facts in dispute but the only question is the interpretation of a written document whether will or contract. This cannot always be done, there are generally in dispute facts upon which the rights depend; and these facts must be determined in some way. The very speediest method of bringing them to a determination consistent with thorough investigation is the best; and a litigant has a legitimate ground of complaint if there is a day's delay beyond the time really necessary.

Delay in bringing a case to trial may be due to the people themselves; their representatives may not have constituted a sufficient number of courts, elected or appointed a sufficient number of judges; or they may have clogged the courts by an intricate and dilatory practice. In that case the people cannot complain; they have the courts and the practice they deserve. If they want something better, let them do something better. It is idle whining about an evil which is due to one's self and one's own negligence or indifference; "whatsoever a man soweth, that shall he also reap."

The delay may be due to a vicious practice which the courts have the power to change for the better; in that case the courts are derelict in their duty if a change is not made. Not rashly—changes in well understood and well established practice are not lightly to be made. I have no high opinion of the "wisdom of our forefathers"—they were probably much the same manner of men as those of the present time, and "there is a good deal of human nature in man;" but any institution that has stood the test of time and fairly well fulfilled the object of its being, deserves to be treated with respect even by our non-reverent generation. Still everything must give way to the public good, reverence for antiquity included.

Speaking generally, if either litigant cannot compel the trial of his case in six months from the institution of proceedings, there is something wrong, and he has a right to complain. There may, of course, be trouble in locating witnesses and procuring their attendance, there may be intricate and protracted experiments to be made, or other causes for delay, but in the general case no want of a sufficient number of judges, no intricacy of practice, no skirmishing of lawyers, should prevent the trial of a case within the time I have mentioned.

It is a matter of the most profound astonishment to those of my Province to see the great delay to which some of the States of the Union submit; our people would not stand it for a year, there would be such an outcry in the press and elsewhere that no government would refuse to bring in, no legislature refuse to pass, amending and corrective legislation.

How is a case to be tried?

There may be constitutional provisions which must be obeyed or the legislature may prescribe. In Ontario there are very few cases in which a jury is of right; in most instances the presiding judge is master of the situation, he may try a case with or without a jury as seems best. At Toronto in 1913, in the lowest court, the Division Court, not one per cent were tried with a jury,* in the next higher, the County Court, 18 per cent were tried with a jury, and in the Supreme Court, 26 per cent. In most of these cases the jury were not allowed to find a general verdict but were confined to answering certain questions of fact submitted to them by the judge, he reserving everything else to himself. In more than thirty years' experience I have known of only two appeals against the action of a trial judge in striking out a jury notice—both unsuccessful.

The saving of time—and wind—is enormous. The opening and closing speeches of counsel to the jury and the charge of the judge are done away; in argument there are very few judges who care to be addressed like a public meeting and quite as few who are influenced by mere oratory—all indeed must

*The official report of the Inspector of Division Courts for 1913, just to hand, shows that in 1913 the total number of suits entered in these Courts in the whole Province was 63,675, and the number of juries called for 117, a little less than one-fifth of one per cent. The whole amount claimed in the suits brought was about two and a half millions; the cost of the juries averaged a few cents over $10.

ex officio be patient with the tedious and suffer fools gladly. Vehement assertion, gross personal attacks on witnesses or parties, invective, appeal to the lower part of our nature, are all at a discount; and in most cases justice is better attained, rights according to law are better ensured. Moreover during the course of a trial a very great deal of time is not uncommonly wasted in petty objections to evidence, in dwelling upon minor and almost irrelevant matters which may influence the jury, wearisome cross-examination and reiteration, etc., all of which are minimized before a judge.

But it is never to be forgotten that the courts belong to the people, and the wishes—even the prejudices—of the people must be borne in mind. If for any reason the body of the people were to come to the opinion that a judge trial was not a just trial, justice would not be satisfactorily administered if that form of trial were adopted. There I leave the matter.

Very often during the course of a trial, facts will come to light which give a new turn to the case; some courts are so hampered, or so hamper themselves, that they cannot go outside of what the lawyers have already put on paper; they cannot "amend the pleadings," and great injustice may result. Whenever by any hide-bound practice a court cannot do justice on the facts because a lawyer has made a mistake, there is a failure in the elementary duty of the court. In the ideal state, every liberty will be given to both parties to bring out all the relevant facts, and judgment will be given on those facts according to the very right and justice of the case even if lawyers make fifty mistakes and a hundred omissions.

Law is not a game where the smartest man wins, it is a serious attempt to determine rights no matter by whose mouth or with what ingenuity—or want of it—they are asked.

The courts are sometimes said to have as their function the making of good lawyers. Perhaps so, but just as one function of a hospital is to make good doctors—a mere by-product of an institution whose primary and fundamental object is to heal the sick—so while that of the court is to give a litigant his rights, there can be no harm in the by-product of good lawyers. There can be no harm in a doctor learning while he is practicing in the hospital, but the doctor who puts in the forefront anything but the cure of the particular patient entrusted to his care is derelict in his duty, recreant to his profession. Comparison with this of the duty of a lawyer is obvious; the place to learn law is the law school and the library, the court is a place to do business in, to determine "Do I get my $800?"

I almost tremble when I suggest that the "good lawyer" of popular conception is no great acquisition to the community any way. Let me not be misunderstood. I pity the lawyer who knows nothing else than the daily routine of a law office or a court, who has become a mere tradesman, handicraftsman; but just as I pity the student at the university who reads only enough to pass on. Law is a liberal and a learned profession, and there are very few fields of knowledge which may not be of advantage in enlarging the mind and understanding. Even deep reading in the older authors will do no great harm if care be taken not to fill the mind with antique views to the detriment of common sense, what I have frequently described as "cluttering up the mind with law." The fact that law is a learned profession does not diminish the significance of the fact that the lawyer is a business man, hired to do his client's business.

A well educated Bar is a great desideratum; a self-respecting Bar is of great value—a Bar, which never forgetting the rights of the client, does not think it inconsistent with duty to assist justice by courtesy to opponents, by civility to witnesses and others, by respect to the court, by a due regard to the exigencies of public business. The noisy showy barrister, who plays to the gallery, seeks to impress his client or the populace with his ability and importance by discourtesy to others, insolence (more or less veiled) to the court, interminable oratory to the jury, is an evil, a public nuisance. That class will always be met with where the people want it. No one can expect total self-abnegation and disregard of his own interests even in a counsel; and "for people who like that sort of thing, that is the sort of thing they like."

What about appeals?

The ideal method would be for the losing party to take all the evidence, papers, etc., in the case, at once before the appellate tribunal, and, both parties being heard, the case to be disposed of without delay. The nearer the practice is assimilated to that ideal system the better, other things being equal. The Appellate Court should, if required by the amount of business, be continuously in session with only such intervals as are necessary to consider the cases presented. The material before the Appellate Court should be all the material in the trial court; this should be got before the Appellate Court at the earliest possible moment and with the least possible expense; the proceedings should be as little technical and complicated as possible, and in this court as elsewhere justice delayed is justice denied. Of course there will often be circumstances causing delay, there may be facts alleged or statements made at or after the trial which must be investigated; people will die and even the counter-irritant of a law suit will not always keep them alive. Leaving aside special circumstances and speaking generally, if a losing litigant cannot have his appeal heard and disposed of in three months from trial there is something wrong. In a certain country, a Chief Justice declined to sit in an appeal because judgment might not be given before the expiration of his term, more than three months distant; that fact and the circumstance that it excited no astonishment will furnish their own commentary.

Moreover there are often trifling errors (generally against technical rules) at the trial; even judges are not exempt from the imperfections of humanity. An Appellate Court should pay no attention to such defects unless some injustice results. There may be some fact left unproved or later discovered. Why should not the Appellate Court allow the fact to be proved before itself? What is the sense in sending a case down for a new trial with all its risks, expense and trouble?

There is one failing with which courts of appeal are very frequently afflicted; they are apt to forget that the main object of litigation is the determination of the rights of the litigants before them, and to imagine that what they are for is to write dissertations on the law. To a lawyer there is no stronger temptation than to follow up a point suggested in a case and to exhaust the law on such point, although it is not really material in the case under consideration. There can be no objection to that course, but it should not be followed so as to delay a decision unduly and thereby deprive the litigant of his right to speedy justice. What is important is, "Do I get my $800?"

I produce to you the list of our Appellate Division, the Court of Appeals in Ontario, for the May, 1914, sittings.

There are eighty-one cases on the list. The judgments from which these appeals are taken were delivered as follows:

Before January 1, 1914	7
In January, 1914	5
In February, 1914	14
In March, 1914	44
In April, 1914	11
In all	81

Of those before January 1, 1914, two are cases of a Municipal Street Railway which is being reorganized, and all parties desire time to complete the financial arrangements. The parties have had several opportunities to argue the appeals if they so desire, and the cases are kept on the list *ex abundanti cautela* for fear the arrangement may fall through. Three others have stood by arrangement of counsel; and one to enable the appellant to procure a preliminary order from a county court judge, *persona designata* under the statute. All of these have had at least one chance to be argued. The seventh is a case *sui generis*. A wife is suing her husband and conducting her own case. Two motions have been made by the defendant to dismiss the appeal for want of prosecution, but the court has extended the time. Much of the evidence at the trial is said to be irrelevant, and the plaintiff is finding difficulty in extracting what is material. She scorns professional help and is perhaps looking for a grievance. At all events we thought we should not cut her out of an appeal.

Of the five decided in January, 1914, two were delayed by illness of counsel, and counsel on the other side agreed to let the cases stand; two by reason of omission of stenographers to get out evidence in time; and in the fifth, counsel mislaid his papers and the other side consented to delay. All these have had at least one chance.

We do not allow cases to stand from month to month without inquiry. From time to time all cases looking stale are called on to be spoken to; and if the reporters are found dereliet they are brought to time. If the parties are not really intending to go on with the appeal promptly, it is dismissed.

During the May sittings all the appeals from judgment delivered in January, 1914, have been disposed of; of those before January, the two about the Street Railway still stand; one other will be disposed of June 1, another June 5; all others have been heard.

There have been added to the May list 3 cases in which judgment was given in March.

We have heard

Of those in February, 11 leaving 3

Of those in March, 35 leaving 12

Of those in April, 9 leaving 2.

In addition to those fully heard, two involving disputes between the Municipality and private individuals have been heard in part and stand for a proposed settlement.

And what law should be administered?

Most of the English-speaking peoples have the tradition of the fundamental distinction of Law and Equity. This distinction is historical and arose from our ancestors having a law of their own of which they were inordinately and stubbornly proud and tenacious, "*Nolumus leges Angliæ mutare*" said the barons on a memorable occasion; and *nolumus leges Angliæ mutare* they continued to think (some indeed consider that the barons have not ceased to be intensely conservative even at the present day). The gross and palpable injustice done by these venerated *leges Angliæ* became intolerable, and after legal fiction had failed to permit justice to be done in the law courts, Equity was invented. "Equity mitigated the rigor of the common law" is the conventional and euphemistic way of putting it; but this cloaks the infamies which the common law enjoined or permitted. The lawyer was not till comparatively late entrusted with this new weapon; the churchman was the early chancellor. But it got at length into the hands of lawyers and became as technical and as formal as the common law whose rigor it was to alleviate. These two systems of law ran along side by side, administered by different courts for centuries, and the English lawyer came to think that this division subsisted in the very nature of things.

It is hard to dislodge inveterate and traditional opinions even when they are wholly without solid foundation. The colonial lawyers raised on English precedents as pabulum, absorbed the English idea and it stuck. I have before me as I write a letter on the subject of the Courts of Law of Upper Canada addressed to the Attorney General and Solicitor General in 1847. This was written by a member of our bar of the highest standing, one who was afterward Chancellor and then Chief Justice of Ontario. Addressing the "Chief law officers of the Crown for Upper Canada upon a subject interesting alike to the profession and to the country—the due administration of justice," and at a "time when changes appear to be contemplated in some of our Courts of Justice," he argues that "law and equity ought to be considered as distinct systems, and that they are so considered and kept apart in England, is, perhaps, one of the best provisions of our Constitution." He approves the statement of Lord Eldon as to "the necessity of that separation of Courts of Law and Equity which so mainly contributes to the complete and effectual administration of justice to an extent and in a degree such as are unknown and must be ever unknown where that separation is not effectually made and observed." In Upper Canada we had got along without a Court of Equity till 1837, and there was in 1847 talk of getting rid of it. Mr. Spragge (the writer spoken of) deprecates such a course, disputes the statement of those who say "we did very well without it before the Court of Chancery was established," for, he says, "the common law was never meant nor is it calculated by itself to form the jurisprudence of a country. Without being tempered by equity law, it would often work injustice, and in its actual operation in this country the application of its rules did work injustice until a language began to be used in our Court of King's Bench which would have sounded strangely in the ear of a common lawyer in England." He thinks that without separate courts "the law . . . would degenerate into an uncertain hybrid system neither common law nor equity, but an incongruous compound of both, so that no man could tell what his rights are." "We must . . . have English law, a combined system of law and equity, or we must abrogate the English law, throw our whole system of law to the winds and adopt the civil law. But were so mad a scheme proposed methinks Upper Canada would answer as with one voice *nolumus leges Angliæ mutare.*" This reasoning was adopted, and as at the Parliament of Merton so at our Canadian Parliament *"Omnes comites et barones una voce responderunt quod nolunt leges Angliæ mutare quas hucusque usitatæ sunt et approbatæ."*

If any lawyer were asked to lay down a code of laws for a new community he would be thought insane if he laid down two codes, one of laws to govern the people, and another to modify and to that extent to nullify the first; and yet because from historical reasons that system grew up in England, many lawyers thought it a necessary system. Even in 1847, some could not conceive of the legislature combining the two systems into one, and directing the fused system to be applied in all courts. And so we had law and equity for over thirty years longer. In 1881 when a simple provision was made that where the rules of law differ from the rules of equity, the rules of equity shall prevail, and this was applied to all courts, many were the mournful laments for the departed glory of our jurisprudence. Rachel weeping for her children could be as easily comforted as the "equity lawyer" when he found that a proceeding to foreclose a mortgage could be taken by writ in the Queen's Bench Division, or the purely common lawyer when he found that the beloved principles of the common law were ruthlessly subdued to the alien rules of equity. I have myself heard a practitioner,

still living, curse what he called the "confusion" of law and equity; but time is the great assuager of grief and the change has vindicated itself. No one now would think of going back to the old system.

This fusion of law and equity has had something to do with the gradual decay of the jury system.

A word or two as to the administration of criminal justice.

The abominable cruelty of the English law, whether the common law as interpreted in early times by the high placed judge or made in later times by the high placed member of parliament for the governance of the lower classes—in either case a mandate in the vast majority of instances of the superior to the inferior—revolted the humane. Rules were extended or invented to save the shedding of blood for petty or even serious offenses. The law was brutal, and its brutality was mitigated or evaded by the ingenuity of less blood-thirsty judges. Trifling defects, errors of form, omissions to prove immaterial allegations, matters of no importance whatever were laid hold of to prevent a judicial murder. Consequently the result of a prosecution became very much a matter of chance; criminals looked upon a verdict of guilty as a bit of bad luck. A chaplain of Newgate of the time has left an awful account of the view taken by prisoners of trials, an account which haunts the reader as a horror for years.

Accordingly, the prosecution of an alleged offender became a kind of sport. The prisoner had so much of a start, so many proceedings were forbidden to his pursuers, he might double and dodge, and in the end, in spite of facts wholly proved, might escape. It was a kind of glorified fox hunt, the quarry having a much greater chance than a fox.

This was about the condition of the law in England when the United States branched off and when Upper Canada was given legislative independence. Both took the law with them. The rights of the accused, the protection of the accused, gave the watchword; and some courts have not forgotten it yet. In not a few courts the prisoner has so many and so sacred rights that no one else has any, the State included. Instead of a criminal trial being a solemn inquiry by the State into a crime alleged to have been committed against it, a criminal trial is apt to degenerate into a game, a play, a spectacle for the curious and a subject for lurid newspaper writing. That provision made by the State for its own protection that no one shall be punished unless and until convicted by a competent court is made a cloak to shelter those who have undoubtedly committed crime; the pettiest of all petty technicalities are invoked as though they were the most profound of principles, on the violation of which the heavens should fall. Time seems not to be considered of importance in many jurisdictions; and in one the members of the bar say openly that a conviction for murder is but the beginning of the criminal trial.

Solemnity and formality in a criminal trial have great influence upon the criminal classes. Severe punishment has not at all the same deterrent effect as certain and speedy punishment. Many a degenerate and wilfully wicked person would be willing to be made the central feature of an eight days' or eight weeks' show with a good chance of evading punishment.

Is all this good for the State?

Once again, if the people really want that sort of thing they must have it; but do the people really want it? Of course the criminal classes, the potential criminal, the lawyer who is paid by the length of time he can make a case last or who seeks glory from technical ingenuity or florid rhetoric, the yellow and near yellow paper and its readers, all are in favor of it. But the man who has to pay for it, the sober-minded citizen who takes an interest and a pride in his country, who is jealous of her honor and reputation—what of him? and is he not to be considered?

If a criminal trial is a game, well and good. The fox hunter who was expostulated with on the cruelty of his sport said, "The men like it, the horses like it, and nobody can be certain that the fox does not like it." But even fox hunters pay for their game out of their own pocket, and if a fox does get away now and then, there is no great harm. We in Canada are too poor to be willing to pay for such a sport and too busy to be willing to waste weeks on an investigation for which days or even hours are ample. We think that except in very grave offenses, such as murder and the like, an accused should have the option to be tried by a judge and without delay, instead of waiting for a jury sittings. If one charged with crime be desirous of trial by jury we allow him a copy of the jury panel in sufficient time to make inquiries as to any objection to the jurymen, and when a trial is set we insist on its being proceeded with, with due diligence and reasonable speed. The first time I met your ex-president, Mr. Taft, he spoke of the intolerable delay in criminal trials in the United States. I told him that a short time before, I had gone to a Canadian city to hold the Assizes on the same day that a few hours further along the same line of rail but across the international boundary, a judge began to get his jury in a murder case; that I had tried four criminal cases and seven civil cases, and was home in Toronto before my American brother had half his jury. I told the New York Bar Association that in my thirty years' experience I never saw it take more than half an hour to get a jury. Let me add that I have never but once heard a proposed juryman asked a question about reading newspapers, forming an opinion, or anything else. I have never known even a murder case (except one) take four days; very few indeed take more than two; none tried before me has taken as much as two full days; and medical or other experts are not allowed to drag out proceedings. We think four on each side enough except in special circumstances and we keep these well in hand.

Is fair play not the only natural right of one accused of crime? It may be that in some courts the proceedings are protracted by the gladiatorial spirit. The prosecuting counsel feels that he has a brief for conviction and that he is vanquished and disgraced if he fails in procuring it. He strains every nerve to that end, stretches the law and colors the facts; and if, *per fas aut per nefas* he hears the jury say "Guilty" he is triumphant. I venture to think that that theory and the practice based upon it are wholly vicious and debasing. In an investigation by the State into an alleged offense against itself, the counsel representing the State has the plain duty to investigate; and the State not desiring that an accused be pronounced guilty if in fact or in law he is not, it is the plain duty of the prosecuting counsel to bring before the court and jury all the facts and all the law—what helps as well as what incriminates the accused.

The wholly brutal system of the judge being the most determined and effective prosecutor has long gone out; the only excuse for it was that not seldom the judge had been the investigator and had become certain of the guilt of the accused. Howell's State Trials are appalling reading at the best; and a judge who would act now as the most venerated of the sages of the law acted in the past would be cursed and despised of all men.

Has not the spirit of these judges descended to some prosecuting counsel?

In Canada, the theory is that the Crown Counsel represents the State. He has no concern with whether the accused is found guilty or not. His whole duty is performed when he has

brought out all the facts by direct evidence or by cross-examination of witnesses for the defence and has summed up to the trial tribunal fairly all the facts. If the judge or, in case of a jury trial, the jury think no case has been made out, that is no concern of his; he is not to blame. Of course, human nature is human nature. Counsel will instinctively want to fight the counsel on the other side. It is difficult to be impartial, particularly when one has a strong conviction of the guilt of the accused; but if counsel wilfully concealed or failed to bring out facts favorable to the prisoner's innocence, if he unduly pressed for a conviction, if he were to urge unfair arguments to the jury, he would lay himself open to unfavorable comment of his professional brethren and the public, as well as to stern rebuke by the trial judge. The method of candor and fair play brings more convictions than the opposite course. A jury like fair play, and if they see a prisoner is not getting it, they are not at all unlikely to feel resentment and to "help the under dog." I am an old Crown Counsel, and I speak whereof I know.

Speed is called for in an appeal in criminal matters. The deterrent effect of punishment varies inversely with the delay in punishing; while if there is to be a new trial, it should be as soon as possible, witnesses disappear or "forget" more quickly and effectively in criminal than in civil matters.

Punishment should follow swiftly; we think, in the Dominion if a Canadian murderer is not hanged within a year of his crime he is justified in complaining of being deprived of his just rights given him by Magna Charta.

There is abroad in some quarters a feeling of unrest and dissatisfaction with the administration of justice, civil as well as criminal. It will not do to say that this is due to machinations of demagogues, to the ambition of politicians out of office. No demagogue or dissatisfied politician can long make any considerable number of the community believe in what has no foundation in fact. The causes of dissatisfaction should be sought out and if possible removed.

Some part of this may be due to a misunderstanding of the true function of the court. It seems impossible for some, and those not the most ignorant or least American, to understand that the court does not make the law. Just as it is said we have in our bodies remains now dormant and useless, even harmful, of organs which were alive and active in the reptile stage through which we are told our race has come, so there is away down in many minds the relics of what was real when the early judges laid down the law to suit themselves. As the nightmare which frights the bravest before a danger which does not exist is said to be a reminiscence of the terror of the ancestor, the naked savage running through the dark forest of old, fleeing a very real danger, so the present nightmare—if it is right to call it a nightmare—may be, at least in part, an atavistic reminiscence of what was once a grim reality. It may be that means can be found and used by the Bar or others to correct such misapprehension.

But is that the only reason? Of course substantive law is for the legislature, but there are many ways in which the Court can do much to make the administration of laws accord with the requirements of the people.

Conservative, Courts must needs be from their very constitution, but that does not imply that they must be unsympathetic to any suggestion of improvement or grudging in giving full effect to amendatory measures, permissive or imperative. Dignified they should be, but that does not imply *otium cum dignitate* with *otium* ninety-five per cent of the prescription. Deliberate, too, but that does not mean so slow that before judgment is given the litigant is dead or hope deferred has made the heart sick. Independent of public opinion every judge must be, but that is not synonymous with indifference to the manner in which the public receive his judgments and the opinion the people have of his honesty. Like Lord Mansfield, while he should despise the popularity that is run after, he may well prize that which follows. He is called upon for imperative public reasons to avoid the very appearance of evil and see to it that nothing in the manner of his judgments is unnecessarily offensive to his fellow-countrymen, however unpalatable the matter may be. That judge received no commendation who, while he feared not God, neither regarded he man; and no judge may use the objurgation, so well known as attributed to a multimillionaire, "the public be damned."

The position of a judge is one of the very highest to which a man can be called in a free country; the influence for good of an upright and conscientious judge is incalculable; and when he exhibits defects of manner, lack of prudence and decorum, contempt of the commonalty, he grieves the judicious and does as much or nearly as much harm as if he were ignorant of law, indifferent to the soundness of his decision, partial in his treatment of the Bar or litigant and subservient to sinister interests.

It is a matter of frequent comment and almost unbounded wonder to those under another system that in these United States, judges who achieve the Bench through a method wholly repugnant to the sentiment of the British peoples are so almost universally found to be of high legal attainment, sound judgment and independent mind. It is a matter of pride to all English-speaking lawyers that the method of election or appointment has been found to be wholly immaterial; the honest lawyer, who the satirists says is the noblest work of God and about the scarcest, is not scarce on the Bench of the Union or any of its component States.

It is a matter of congratulation that it is almost unknown that even the bitterest critic charges want of learning, ability or honesty in the occupants of the Bench. It is, however, alleged that dissatisfaction has been felt with an apparent indifference to the demands of an advancing society, an unsympathetic attitude towards the masses. So far as that means that the courts should change the law laid down for them by decision or statute, the criticism is unjust and cannot be accepted. If it means that rules are allowed to crystallize into technical language so rigid that the letter can defeat the underlying spirit and purpose, "the case is different." The application of rules "must correspond with the practical necessities of the times." At least that is so in my democratic country; and I gladly adopt the language of the great lawyer whom many of you heard last summer in Montreal, the Lord Chancellor, Viscount Haldane, delivering judgment in the House of Lords, (1914) A. C. at pp. 37-38.

How far those in a land in which a system different from ours prevails can go in making the rules "correspond with the practical necessities of the times," I cannot say; but is not some of the real foundation (as distinguished from the political pretext) of this agitation, based upon the conviction that the practical necessities of the times have not been considered?

Be that as it may, it is perfectly certain that in every free country the people will and must have their way in the long run—with courts as with all else. It is a part of the patriot and the statesman to see to it that that way is the right way, and that the right way is found with the least possible delay. The right way in litigation implies justice cheap, speedy, full and certain; and anything in the constitution and practice of the courts which is not conducive to that end is wrong and must be amended; if by the courts themselves, so much the better, and the sooner the better, but in any case it must be amended.

We live in an age of unrest; the principles of underlying institutions are being investigated as never before; nothing is taken

for granted; the motto is "you have got to show me;" the ever iterated and re-iterated question is "Why?" "Why?" "Why?" The courts should not and cannot hope to be an exception. "If our virtues did not go forth of us, 'twere all alike as if we had them not." The administration of justice is on its trial. What will be the verdict?

So long as there is a moral law governing the universe, so long as its affairs are governed by the Divine Law, the verdict must be certain. With a Bar alive with a keen sense of public duty, with a Bench whose members can say with truth and pride, "I have judged the people with righteousness and the poor with judgment—judgment have I laid to the line and righteousness to the plummet—I have executed the judgment of truth and peace in the gates—touching the righteousness which is in the law I am blameless—I have done no unrighteousness in judgment—I did not respect the person of the poor nor honor the person of the mighty, but in righteousness did I judge my neighbor—for I did not respect persons in judgment but heard the small as well as the great and was not afraid of the face of man—I did not wrest judgment nor take a gift, nor did I ask for a reward—I did not take bribes and pervert judgment—but I judged righteous judgment, the judgment which cometh from the Lord"—the verdict must be "Well done, good and faithful servants."

Cases of Interest.

WHAT IS "NAVIGABLE WATER."—An interesting case involving the right of a fishing and hunting club to enjoin a professional hunter and trapper from exercising his vocation on its game preserve is Delta Duck Club *v.* Barrios, (La.) 65 So. 489. One of the questions arising related to the navigability of a stream therein, and the court laid down the rule that a "navigable" water which the public is entitled to use as a highway is such an one as in its natural state affords a channel for useful commerce, and not such as is only sufficient to float a hunter's canoe. An injunction was granted in the case.

FRIGHT CAUSING PHYSICAL INJURY AS GROUND FOR RECOVERY OF DAMAGES.—In Massachusetts damages cannot be predicated on fright unaccompanied by physical injury, but if physical injury results damages are recoverable in case the fright was caused by a negligent act. An unusual case involving this rule is Conley *v.* United Drug Co., 105 N. E. 975. An explosion of gas frightened the plaintiff, causing her to faint and fall on the floor and sustain a physical injury. It was held that the plaintiff was entitled to recover damages, assuming that the explosion was due to the negligence of the defendant. This fact was not established, however, and judgment was rendered for the defendant.

WHAT CONSTITUTES DISTURBING RELIGIOUS WORSHIP.—In Ellis *v.* State, (Ala.) 65 So. 412, the defendant was indicted under section 6768 of the Alabama Criminal Code for disturbing religious worship. The evidence for the state showed that the cursing and other discourse of the defendant relied upon as acts constituting a disturbance of religious worship such as was denounced by the statute, took place on the church grounds, where the members had assembled to attend religious services. At the particular time the disturbance was shown to have occurred, the members were eating a "basket dinner," just after the close of the regular morning religious service that had taken place in the church building, and only a short while before the time for holding the regular afternoon service. It was held that the conduct of the defendant constituted a disturbance of religious worship. The court said: "The congregation could properly be said, under the circumstances shown, to have recessed for the purpose of eating dinner between the times for regular services. If a congregation is assembled upon the church grounds for religious worship, the statute is applicable, and the assemblage is under its protection, although the disturbance takes place at a time when the regular services are not in progress."

LIABILITY OF MUNICIPAL CORPORATION FOR ACCUMULATION OF FRUIT PEELINGS ON SIDEWALK.—The liability of a municipal corporation to a pedestrian who is injured by slipping on fruit peelings on a sidewalk is well stated by the Supreme Court of Alabama in City of Bessemer *v.* Whaley, 65 So. 542, in the following language: "We will not be understood as holding that a person who receives injury by slipping and falling over a casual banana peeling may recover damages of the municipality. There may be, there is, danger to the pedestrian in a single banana peeling or other like substance; but municipal authorities cannot be expected to know actually the presence of such trivial, casual, isolated, and impermanent things, nor can they be charged with knowledge by construction. If, however, the corporation for a long time has permitted at a certain place the daily and habitual accumulation of fruit peelings, banana peelings, decayed vegetable matter, and other loose substances, to the great danger of those using the sidewalk as a walkway, as the counts of the complaint allege, it seems to be satisfactorily established in reason and authority that it should be held liable to a pedestrian who is injured thereby while in the exercise of due care and prudence."

LIABILITY OF RAILROAD FOR SUDDEN APPLICATION OF EMERGENCY BRAKE THROWING PASSENGER AGAINST SEAT AND INJURING HIM.—In Dorr *v.* Lehigh Valley R. Co., (N. Y.) 105 N. E. 652, which was an action by a passenger against the railroad company for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant, the material facts were as follows: The plaintiff, while a passenger on a train of the defendant, was severely injured in the knee by reason of the sudden application of the emergency brake by the engineer. The shock threw the plaintiff against the seat in front of him with great violence. The brake was applied as the train approached a highway crossing at grade, to avoid striking an old man who was attempting to cross the tracks at that point, but who was nevertheless struck by the train and killed. A nonsuit was entered by the trial court which on appeal was set aside on the ground that the plaintiff was entitled to have the jury pass upon the question whether the defendant exercised due care toward him as a passenger on the occasion of the accident. The court said: "If the use of the brake . . . involved no negligence on the part of the persons operating the train, at or about the time of the accident, of course the defendant could not be held liable for the injuries inflicted upon the plaintiff by the violent stop; as, for example, if in order to avert destructive collision with a sudden landslide immediately in front of the locomotive, the engineer had been compelled to check the movement of the train at all hazards. In the present case, however, the contention of the plaintiff is that the use of the emergency brake as it was used only became imperative because of the previous negligence of the engineer or fireman, or both, in failing seasonably to observe the approach of the old man who was killed, so that the train might have been stopped and his life saved without having recourse to such violent means of stopping it."

LIABILITY OF INNKEEPER FOR REFUSING TO SERVE A GUEST REFUSING TO PAY A LAWFUL CHARGE.—Justice Cardozo of the New York Court of Appeals in Morningstar *v.* Lafayette Hotel Co., 105 N. E. 656, states and decides the leading question involved there in the following language: "The plaintiff was a guest at the Lafayette Hotel in the city of Buffalo. He seems to have wearied of the hotel fare, and his yearning for variety has provoked this lawsuit. He went forth and purchased some spareribs, which he presented to the hotel chef with a request that they be cooked for him and brought to his room. This was done, but with the welcome viands there came the unwelcome addition of a bill or check for $1, which he was asked to sign. He refused to do so, claiming that the charge was excessive. That evening he dined at the café, and was again asked to sign for the extra service, and again declined. The following morning, Sunday, when he presented himself at the breakfast table, he was told that he would not be served. This announcement was made publicly, in the hearing of other guests. He remained at the hotel till Tuesday, taking his meals elsewhere, and he then left. The trial judge left it to the jury to say whether the charge was a reasonable one, instructing them that if it was the defendant had a right to refuse to serve the plaintiff further, and that if it was not the refusal was wrongful. In this there was no error. An innkeeper is not required to entertain a guest who has refused to pay a lawful charge. Whether the charge in controversy was excessive was a question for the jury."

VALIDITY OF STATUTE REQUIRING CONSENT OF WIFE TO ASSIGNMENT OF HUSBAND'S WAGES.—The right of a state legislature to restrain a married man from making a valid assignment of his wages without his wife's consent is upheld in Cleveland, etc., R. Co. v. Marshall, (Ind.) 105 N. E. 570, which declares constitutional a statute enacted in 1909, reading in part as follows: "No assignment of his wages or salary by a married man, who shall be the head of a family residing in this state, shall be valid or enforceable without the consent of his wife, evidenced by her signature to said assignment executed and acknowledged before a notary public, or other officer empowered to take acknowledgments of conveyances." Morris, J., delivered the opinion of the court, certain passages of which are as follows: "It is evident that in enacting section 4 of the act of 1909 our legislature was controlled by the same purpose which led the framers of our constitution to command, by section 22 of our Bill of Rights, that liberal exemption laws be enacted, and which inspired the subsequent enactment of our many statutes designed for the protection of the wives and children of resident householders. . . . In 1908 the legislature of Massachusetts enacted a law (St. 1908, c. 605) section 8 of which provides that certain assignments of wages to be earned in the future shall be void when made by a married man without his wife's consent. The constitutionality of the provision was assailed in Mutual Loan Co. *v.* Martell, 200 Mass. 482, 86 N. E. 916, 43 L. R. A. (N. S.) 746, 129 Am. St. Rep. 448. The act was held valid. On appeal to the Supreme Court of the United States that court held that the act was not in conflict with the Fourteenth Amendment to the Federal Constitution, and affirmed the ruling of the Supreme Judicial Court of Massachusetts. Mutual Loan Co. *v.* Martell, 222 U. S. 225, 32 Sup. Ct. 74, 56 L. ed. 175, Ann. Cas. 1913B 529, and monographic note on page 531 et seq. The opinion was delivered by Mr. Justice McKenna, and contains the following language: 'There must, indeed, be a certain freedom of contract, and as there cannot be a precise, verbal expression of the limitations of it, arguments against any particular limitation may have plausible strength, and yet many legal restrictions have been and must be put upon such freedom in adapting human laws to human conduct and necessities.' Our statute is different from the Massachusetts act in that it covers wages already earned, as well as future earnings; and the wages here in controversy were in part earned before the execution of the assignment. We perceive no reason why the prohibiting statute may not be as well directed against assignments of wages already earned as against future earnings. Otherwise the beneficent purpose of the lawmaking body might be thwarted by repeated assignments of wages, executed as soon as the wages were earned, but before their payment may become due. The law makes it the duty of a married man to support his wife and infant children, and makes it a felony to desert them under certain conditions. Acts 1913, p. 956. When a man marries, his dominion over his property becomes subject to reasonable regulations and restrictions by the state, and this dominion may be further restricted by laws enacted subsequent to the marriage."

CONSTITUTIONALITY OF STATUTE REQUIRING RAILROAD COMPANIES TO PAY WAGES DUE EX EMPLOYEE WITHIN CERTAIN TIME.—An Indiana statute requiring that "any railroad company employing men shall within seventy-two hours after any employee voluntarily quits such service or is discharged pay to such employee in full the wages due to the time of quitting of such service" has been declared unconstitutional in Cleveland, etc., R. Co. *v.* Schuler, (Ind.) 105 N. E. 567, on the ground that it is class legislation. The court says: "It is true, as appellant concedes, that railroads may be placed in a class by themselves for some legislative purposes, but only for such purposes as have to do with duties peculiar to them as carriers, or with the dangers peculiar to their operation. . . . There is nothing in the act under consideration which suggests a valid basis for the classification which it makes. It is not designed to regulate the business of common carriers, nor has it any reference to the hazards peculiar to the operation of railroads. In brief, no good reason appears for requiring railroads to pay in accordance with the provisions of this act those who leave their service, while manufacturing corporations and other employers of labor are excepted from its operation. In the case of Gulf, Colorado & Santa Fe R. Co. *v.* Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666, the Supreme Court of the United States had under consideration an act passed by the legislature of the state of Texas which provided that if railroad companies, under certain conditions, failed to pay valid claims 'for personal services rendered or labor done,' etc., within thirty days after such claims were duly presented, the claimant, in recovering a judgment thereon, should recover also certain attorney's fees. In holding the act unconstitutional the court, speaking by Mr. Justice Brewer, used the following language which we deem applicable here: 'It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. . . . If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads of all corporations are selected to bear this penalty. . . . That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them to secure life and property. . . . But a mere statute to compel the payment of indebtedness does not come within the

scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. There is a duty resting upon all debtors; and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation.'"

CONSTITUTIONALITY OF MINNESOTA WORKMEN'S COMPENSATION ACT.—The Minnesota Workmen's Compensation Act was declared constitutional in Matheson *v.* Minneapolis St. R. Co., 148 N. W. 71. The act in question provides that compensation shall be made by the employer to the employee, or in case of his death to his dependents, for injuries sustained in the course of the employment, "provided the employee was himself not wilfully negligent;" but the act does not apply to those railroads, or those employees of railroads, that are subject to the laws of the United States enacted pursuant to the power to regulate commerce, nor to domestic servants, farm laborers, or persons whose employment is only casual. The act is separated into two divisions designated as part 1 and part 2. The provisions of part 2 apply only in the event that both employer and employee elect to become subject thereto. If either or both elect not to become subject to part 2, the provisions of part 1 apply. If the employer had elected not to become subject to part 2, he cannot interpose as a defense, in an action brought under part 1, that the employee was negligent, unless such negligence was wilful; nor that he had assumed the risk; nor that the injury was caused by the negligence of a co-employee. If the employer declines to accept the provisions of part 2, he loses the benefits of these three defenses; if he accepts the provisions of part 2, but the employee declines to accept such provisions, the employer retains the benefit of such defenses. It was claimed that the act violated the equality provisions of the state and federal constitutions for the reason that it abrogated these three defenses, in actions under part 1, brought against employers who elected not to accept the provisions of part 2, but permitted such defenses to be interposed, in actions under part 1, brought against other employers, and also for the reason that the act excluded from its provisions domestic servants, farm laborers, casual employees, and such railroads and railroad employees as were within the legislative domain of the United States. Both objections to the validity of the statute were overruled. The court said: "Other courts have held, and we think for sufficient reasons, that the exclusion of domestic servants, farm laborers, and persons whose employment is casual only, from the operation of laws providing compensation for injured workmen is within the proper discretion of the legislature. . . . We also think that the legislature is well within its prerogative when it places in one class employers who become subject to the provisions of part 2 of the act, and in another class employers who do not become subject to such provisions; also when it places in one class employees who become subject to such provisions, and in another class employees who do not become subject thereto. Employers who become subject to part 2 thereby tender to their employees, as a consideration for exemption from common-law liabilities, rights and privileges which did not previously exist, and offer to assume the burden of duties and obligations which were not previously imposed upon them. Employees who become subject to part 2 thereby tender to their employers immunity from common-law actions as a consideration for the rights and remedies provided for by part 2. These propositions become binding contracts in respect to all who accept them, and remain as continuing offers to those who have not accepted them. An employer or employee, who, at his option, may secure all the advantages possessed by any other, is hardly in a position to claim that he is discriminated against. The legislature has the power to determine the public policy of the state, and, in furtherance of any policy adopted by it, may enact proper laws tending to induce conformance therewith. The defenses of contributory negligence, assumption of risk, and negligence of a fellow servant were doubtless abrogated in the cases specified, and not abrogated in other cases, to induce an acceptance of the provisions of part 2 of the act. But notwithstanding this purpose, the act permits any employer to place himself within either class of employers at his election, and to change from one to the other if he so desires; it also permits any employee to place himself within either class of employees at his election, and to change from one to the other if he so desires. Such legislation is not discriminatory and is not inhibited by the constitution. Furthermore, if its validity rested upon the distinction between the two classes of employers and the distinction between the two classes of employees, we could not say that such distinction is so fanciful and arbitrary, or so wanting in substance, that the legislature is prohibited from applying rules to one class which it does not apply to the other. This is in harmony with the holding of other courts."

CONSTITUTIONALITY OF WISCONSIN EUGENICS LAW.—Wisconsin has a statute enacted in 1913 which provides in part as follows: "All male persons making application for license to marry shall at any time within fifteen days prior to such application, be examined as to the existence or non-existence in such person of any venereal disease, and it shall be unlawful for the county clerk of any county to issue a license to marry to any person who fails to present and file with such county clerk a certificate setting forth that such person is free from acquired venereal diseases so nearly as can be determined by physical examination and by the application of the recognized clinical and laboratory tests of scientific search. Such certificate shall be made by a licensed physician, shall be filed with the application for license to marry." The constitutionality of the above statute was passed upon in Peterson *v.* Widule, 147 N. W. 966. In the trial court it was held unconstitutional because: "(1) It is an unreasonable restriction upon the inalienable right of marriage; (2) it impairs the inherent right to enjoy life, liberty, and the pursuit of happiness; (3) it interferes with religious freedom." On appeal, however, the judgment below was reversed and the statute declared constitutional. Winslow, C. J., writing the opinion of the court said: "The power of the state to control and regulate by reasonable laws the marriage relation, and to prevent the contracting of marriage by persons afflicted with loathsome or hereditary diseases, which are liable either to be transmitted to the spouse or inherited by the offspring, or both, must on principle be regarded as undeniable. To state this proposition is to establish it. Society has a right to protect itself from extinction and its members from a fate worse than death. If authority be needed to support this proposition, reference may be made to Freund on Police Power, § 124, and cases there cited. When the legislature passes a constitutional law, that law establishes public policy upon the subjects covered by it, and that policy is not open to question by the courts. The courts must sustain a law unless its unconstitutionality be beyond reasonable doubt. If the law be ambiguous or open to two constructions, that construction which will save it from condemnation and accomplish the legislative purpose is always to be adopted in preference to a construction which makes it unconstitutional. Neither the legislative idea nor the legislative purpose in the passage of the present law can be a matter of serious doubt. The idea plainly was that the transmission of the so-called venereal diseases by newly married men to their innocent wives was a tremendous evil, and the purpose just as plainly was to remedy that evil so far as possible by preventing

the marriage of men who upon examination were found to possess such diseases. An argument is made that the law is void because the classification is unreasonable, arbitrary, and discriminatory, in that it singles out men about to marry and makes a class of them; there being, as it is argued, no substantial differences which suggest the propriety of different legislative treatment between men who are about to marry and women who are about to marry. Theoretically the argument is strong. Women who marry and transmit a loathsome disease to their husbands do just as much harm as men who transmit such a disease to their wives; if women were in fact doing this thing as frequently or anywhere nearly as frequently as men, the argument could hardly be met. The medical evidence in the case, however, corroborates what we suppose to be common knowledge, namely, that the great majority of women who marry are pure, while a considerable percentage of men have had illicit sexual relations before marriage, and consequently that the number of cases where newly married men transmit a venereal disease to their wives is vastly greater than the number of cases where women transmit the disease to their newly married husbands. Classification is not to be condemned because there may be occasional instances in which it does not fit the situation; it is proper if the great mass of situations to which the law applies justify the formation of a class and the application of some special or different legislative provisions to that class. Classification can rarely be mathematically exact. The question is not whether in some individual instance there is any perceptible distinction, but 'whether there are characteristics which in a greater degree persist through the one class than in the other,' and which justify the different treatment. State *v.* Evans, 130 Wis. 381, 110 N. W. 241. That there are such characteristics in the class of unmarried men is as certainly true as it is discreditable to the male sex."

New Books.

Commentaries on the Law of Evidence in Civil Cases. By Burr W. Jones of the Wisconsin Bar, Professor of the Law of Evidence in the College of Law of the University of Wisconsin. With the law applicable to each section of the original text, rewritten, enlarged and brought with authorities up to the present date by L. Horwitz of the San Francisco Bar. San Francisco: Bancroft-Whitney Company. 1913.

In the March number of LAW NOTES, with three volumes of Professor Jones's work on Evidence before us, we took occasion to commend it highly to the profession. Since then we have received the remaining volumes, two in number. Volume 4 deals with depositions, including those in state and federal courts, and volume 5 with the attendance and examination of witnesses. This last volume also contains a table of cases and a general index. The volumes at hand show the same uniformity of excellence which characterizes the other ones, and complete a work which is bound to be widely used.

The Minimum Wage. With Particular Reference to the Legislative Minimum Wage under the Minnesota Statute of 1913. By Rome G. Brown. Pp. 98+xv. Minneapolis, Minn.: The Review Publishing Co. 1914. $1.

Here we have a book dealing with a subject much discussed during the last political campaign and already made tangible by statute in several states. For example, in Nebraska and Massachusetts there are noncompulsory acts, and compulsory acts with penalties were passed in 1913 by the legislatures in Oregon, Washington, Colorado, Wisconsin and Minnesota. Mr. Brown treats of the minimum wage from the standpoint of both ethics and economics, and after a careful consideration of certain economic objections to such a law he proceeds to consider the various statutes now in force, paying particular attention to the Minnesota Act, and raising many objections to its constitutionality. He is of opinion that compulsory minimum wage acts are unconstitutional, and that constitutional authorization by states still makes them objectionable to the Federal Constitution. He says: "The legislative minimum wage as applied to private employment necessarily restricts the liberty of contract, creates an arbitrary discrimination between one class and another, not only of employers but also of employees, and compels the employer to contribute, out of his investment and out of his earnings, for the benefit of employees and for their sustenance, as well as for the general public benefit. Such statute, therefore, contravenes the express terms of the Federal Constitution, prohibiting any state from enforcing any law which deprives a citizen of liberty or of property without due process of law, or which denies to any citizen the equal protection of the laws. If such prohibition is also incorporated in a state constitution, a legislative minimum wage statute contravenes both the state and the federal constitutions. If the state constitution is changed so as to permit by terms the minimum wage, that means that its repugnancy to the state constitution is alone removed. The federal prohibition still remains, and is the supreme law of the land, which it is the duty of all the courts, federal or state, and a duty imposed upon all state and federal judges under express oath, to recognize and to enforce. These constitutional obstacles are recognized by all intelligent writers and advocates in favor of the legislative minimum wage in private employment. The recognition of this constitutional prohibition induced Massachusetts and Nebraska to make their minimum wage statutes noncompulsory. The states of California and Ohio amended their constitutions, either on the theory that such amendment solved the constitutional difficulty presented, or was a necessary step in connection with inserting a minimum wage amendment in the Federal Constitution." The volume has an appendix containing: I. The Minnesota Minimum Wage Statute; II. Questions propounded as to Minnesota Statute by Advisory Board; III. Provisions of Minimum Wage Statutes in other States Summarized. Mr. Brown writes like one who has given a good deal of thought to the subject of the minimum wage. Moreover, he has shown that he is able to clothe his thoughts in language which makes them readily intelligible to the general reader. His book deserves careful consideration from both friend and foe of the new legislation.

The American Doctrine of Judicial Supremacy. By Charles Grove Haines, Ph.D., Professor of Political Science in Whitman College. Pp. 365+xviii. New York: The Macmillan Company. 1914. $2.

This volume contains the most complete treatment of the American doctrine of judicial supremacy we have seen in many a day. The author evidently has spent a vast amount of time in collecting his material and arranging it, and the result of his labors is exceedingly instructive and moreover extremely entertaining. There are many, no doubt, who would say that Chief Justice Marshall and his associates, in the famous case of Marbury *v.* Madison, gave birth to the doctrine that the right to declare laws invalid was an inviolable and indispensable function of the federal judiciary, but we see from an examination

of Professor Haines's book that before that case was decided the doctrine was in existence. Mr. Haines traces the growth of judicial supremacy from colonial times to the present moment as shown by judicial utterances and the writings and speeches of public men. An interesting chapter is entitled "Recent Criticisms of the Practice of Judicial Supremacy," wherein he quotes from numerous dissenting opinions of the United States Supreme Court to show that strong judges view with alarm the power exercised by that court in declaring statutes unconstitutional. Comment is made in this chapter on the proposed constitutional changes looking to the curbing of judicial supremacy, such as the recall of judicial decisions. We commend the volume before us as well worth one's attention.

Law as a Means to an End. By Rudolf von Ihering, late Professor of Law in the University of Göttingen. Translated from the German by Isaac Husik, Lecturer on Philosophy in the University of Pennsylvania. With an Editorial Preface by Joseph H. Drake, Professor of Law in the University of Michigan, and with Introductions by Henry Lamm, Justice of the Supreme Court of Missouri, and W. M. Geldart, Vinerian Professor of English Law in the University of Oxford. Pp. 483+lix. Boston: The Boston Book Company. 1913.

This is Volume V of the Modern Legal Philosophy Series, there being thirteen altogether. The series is edited by a committee of the American law schools, and different volumes have from time to time been noticed in these columns. We are told that the author of the present volume is known to American lawyers as the German Bentham, because of the fact that they thought along the same lines, that each belonged to a transition period in the legal thinking of his own country, and that each suggested similar correctives for the legal fallacies of his time and his environment. Rudolf J. von Ihering was born at Aurich, in East Friesland, on August 22, 1818. He was descended from a long line of lawyers and administrators. Following the family tradition he studied law, hearing lectures at Heidelberg, Munich, Göttingen and Berlin. He received his doctor degree from the University of Berlin in 1842, with a dissertation entitled "De Hereditate Possidente." In the following year he began work as an instructor in law. He became professor of law at Basel in 1845, was called to Rostock in 1846, to Kiel in 1849, to Giessen in 1852, and to Vienna in 1868. In 1871 he was recalled from Austria to the newly established German university at Strassburg. After one year's residence here he received a call to Göttingen, where he continued to teach until his death, on September 17, 1892, declining calls to Leipsic and Heidelberg. During his stay at Vienna he received his title of nobility from the Emperor of Austria. The fundamental idea of the present work consists in the thought that Purpose is the creator of the entire law; that there is no legal rule which does not owe its origin to a purpose, i. e., to a practical motive. This idea prevails throughout the book. In the editorial preface Professor Drake says: "American juristic thinking at the present time needs a Von Ihering. Our jurists, our legislators and our courts, both bench and bar, are still holding fast to an historical 'Naturrecht' built up on the precedents of the Common Law, which has many analogies to the type of juristic thinking in vogue in Germany during the first half of the nineteenth century. All of our lawyers, judges and legislators who are trained in the traditions of the Common Law hold with characteristic and commendable professional conservatism to the good that is and has been in our legal system, insisting, too, upon the prime virtue of a system of law that is certain, but apparently forgetting that law is not an end in itself and as such to be brought to a state of formal and static perfection, but that the end is the good of society. The public is crying out against our crystallized and inelastic theory and practice of law. The proper application of the idea of law as purpose would, in many cases, loosen our legal shackles and open the way out of our legal difficulties." Mention should be made of the excellent translation of Mr. Husik, which is deserving of praise, and the make-up of the book which is attractive.

The Occupational Diseases. Their Causation, Symptoms, Treatment and Prevention. By W. Gilman Thompson, M.D., Professor of Medicine, Cornell University Medical College in New York City; Visiting Physician to Bellevue Hospital. Pp. 724+xxvi. Illustrated. New York and London: D. Appleton & Company. 1914.

The preface tells us that this work, which is the first of its kind to be published in this country, is designed primarily for physicians interested in the subject of the Occupational Diseases of Modern Life, and also as a guide for students of social economics, social service workers, insurance actuaries, and those whose special interests deal with problems of labor legislation, or with workers in the chemical, textile, and many other manufactures or trades in which the health of the workman is closely related to problems of efficiency and humanitarian effort. The volume is divided into five parts. Part I treats of the history and classification of occupational diseases and deals with general pathology and etiology. Part II discusses general remedial measures such as education, workingmen's insurance, hygiene and ventilation, food and drink, physical examination, and legislative control. Part III has to do with diseases due to irritant substances, such as toxic metals and their compounds; toxic gases, vapors and fumes; toxic fluids, acids and miscellaneous fluids; irritant dusts and fibers; and germs. Part IV deals with diseases due to harmful environment and embraces air modification, temperature modifications, light modifications, and electric shock. Part V considers special occupational diseases relating to the blood, nerves, eyes, ears, mouth, nose and throat, skin, bones and joints, and bladder. Part VI treats of the influence of special conditions on occupational diseases, such as alcoholism, syphilis, abuse of foods, abuse of non-alcoholic stimulants and drugs, and abuse of tobacco. Part VII deals with miscellaneous occupational diseases grouped by industries. The completeness of the work is apparent from an examination of its contents. In view of the increasing attention which is now paid to the condition of workingmen the volume is exceedingly timely. The author has a lucid style which makes it easy for the layman to understand what he is talking about, and no one should hesitate to take up the volume for fear that it is too technical. It will be a pity if it is not generally read. There are numerous helpful illustrations and the workmanship is excellent.

News of the Profession.

THE COUNTY JUDGES AND COUNTY COMMISSIONERS' ASSOCIATION OF TEXAS met in semi-annual convention at Dallas, Tex., on August 6 and 7.

THE UTAH STATE BAR ASSOCIATION held its annual session at Ogden on August 15. Further particulars will be noted in the next issue of LAW NOTES.

TEXAS JUDGE RESIGNS.—R. W. Simpson, of Pittsburg, Tex., has tendered his resignation as Judge of the Seventh Judicial District of Texas.

PRESIDENT OF COMMERCIAL LAW LEAGUE.—Edward H. Brink, a Cincinnati attorney, has been elected President of the Commercial Law League of the United States.

THE MINNESOTA STATE BAR ASSOCIATION held its annual meeting at St. Paul on August 20, 21 and 22. The meeting will be further noticed in LAW NOTES for October.

UNITED STATES ATTORNEY RESIGNS.—James H. Wilkerson, United States attorney for the northern district of Illinois, has tendered his resignation to President Wilson.

RESIGNATION OF ATTORNEY GENERAL.—Thomas Carmody, Attorney General of New York State, has resigned from office to take up the private practice of law in New York city.

APPOINTED TO BENCH IN ILLINOIS.—Governor Dunne of Illinois has appointed William K. Whitfield of Decatur, judge of the sixth judicial circuit to succeed W. C. Johns, deceased.

THE NEW MEXICO STATE BAR ASSOCIATION held its annual meeting in Albuquerque, N. Mex., on August 18 and 19. The next number of LAW NOTES will contain further particulars.

APPOINTED DEAN OF LAW SCHOOL.—C. P. Fenner, one of the leading lawyers of New Orleans, has been appointed Dean of the Tulane Law School, succeeding Professor D. O. McGouney, resigned.

THE OHIO STATE BAR ASSOCIATION has elected John M. Vandeman, of Dayton, president, succeeding Harlan F. Burkett, of Findlay, and re-elected Charles M. Buss, of Cleveland, secretary, and Clement R. Gilmore, of Dayton, treasurer.

ILLINOIS JURIST DIES.—Charles Whitney, Circuit Judge, and a member of the Appellate Court of the Northern District of Illinois, died suddenly at Waukegan, Ill., on July 18, aged 65.

THE TEXAS BAR ASSOCIATION has elected the following officers for the ensuing year: President—Allen Sanford, Waco; vice-president—John L. Dyer, El Paso; secretary—John W. Kincaid, Dallas; treasurer—W. D. Williams, Dallas.

NAMED JUDGE IN OHIO.—State Senator Carl D. Freibolin of Cuyahoga county has resigned from the senate and has been named by Governor Cox of Ohio as Common Pleas Judge in Cuyahoga county to succeed Judge James Lawrence, deceased.

THE INDIANA STATE BAR ASSOCIATION elected the following officers at its recent annual meeting: President—Thomas E. Davidson, Greensburg; vice-president—Robert W. McBride, Indianapolis; secretary—George H. Batchelor, Indianapolis; treasurer—Elias D. Salsbury, Indianapolis.

COLORADO BAR ASSOCIATION.—The following officers were elected by the Colorado Bar Association at its recent annual meeting: President—Edwin C. Stimson, Denver; vice-president—Alfred R. King, Delta; second vice-president—Fred A. Sabin, La Junta; secretary and treasurer—W. H. Wadley, Denver.

WOMAN'S BAR ASSOCIATION.—At the first meeting of the Woman's Bar Association of Illinois, held recently at Chicago, the following officers were elected: President—Nettie Rothblum; vice-presidents—Alice C. Edgerton and Martha Elvert; treasurer—Eunice Martin; secretary—Elizabeth L. Hoffman.

ALABAMA STATE BAR ASSOCIATION.—The newly elected officers of the Alabama State Bar Association are as follows: President—Ray Rushton, Montgomery; vice-presidents—Joseph H. Nathan, Sheffield; W. C. Fitts, Birmingham, W. I. Goddbold, Camden, and J. T. Stokely; secretary and treasurer—Alexander Troy, Montgomery.

KENTUCKY STATE BAR ASSOCIATION.—The following officers were elected by the Kentucky State Bar Association at its last annual meeting: President—W. W. Thomas, of Bowling Green; secretary—W. W. McDowell, of Louisville; treasurer—W. W. Crawford, of Louisville; vice-presidents—C. C. Grassham, of Paducah; W. L. Porter, of Glasgow; Robert Gordon, of Louisville; Judge Marshall, of Shelbyville; Victor Bradley, of Georgetown; R. C. Simmons, of Covington, and V. W. Bush, of Winchester.

DEATH OF MISSOURI JUDGE.—Judge Elijah H. Norton, a former member of the Missouri Supreme Court, died at Platte City, Mo., on August 5. Judge Norton was born in Logan County, Ky., November 21, 1821, and was educated at Cantrall College and Transylvania University. He moved to Missouri in 1842. He was elected Circuit Judge before the Civil War and was a member of Congress in 1861 and 1862. In 1868 he was the Democratic nominee for Judge of the Supreme Court and was defeated. He was a member of the constitutional convention of 1875 and was appointed Judge of the Supreme Court in 1876. In 1878 he was elected Judge of the Supreme Court for a term of ten years. He left the bench in January, 1889, and had since lived in retirement. His portrait has a place of honor on the walls of the Supreme Court room.

WASHINGTON STATE BAR ASSOCIATION.—The annual convention of the Washington State Bar Association was held at Wenatchee, Wash., on August 5, 6, 7 and 8. The official program for the convention included the following addresses: President's address, by Ira P. Englehart, North Yakima; "The Folly of Our Tax System," by T. D. Rockwell, former chairman of the state tax commission, Olympia; "The Probate Law—Present and Proposed," by Dix H. Rowland, Tacoma; "Probate Records and Procedure," by D. K. Sickles, deputy county clerk, probate department, Seattle; "Some Problems of Representative Government," by Judge Charles H. Carey, Portland, Oregon; "The Court's Work," by Judge O. G. Ellis of the Washington Supreme Court; "The Necessity of an Irrigation Code," by Prof. O. L. Waller, State College, Pullman; and "The Late C. C. Gose, ex-president State Bar Association," eulogy by W. T. Dovall, Seattle.

VIRGINIA STATE BAR ASSOCIATION.—The twenty-sixth annual meeting of the Virginia State Bar Association was held at Hot Springs, Va., on August 4, 5 and 6. The president's address was delivered by Major Samuel Griffin of Bedford City. Charles E. Littlefield of the New York bar, formerly a member of Congress from Maine, delivered the annual address on the "Panama Canal Tolls." Other addresses were by Lewis C. Williams of Richmond, on "Employer's Liability and Workmen's Compensation Law;" by Professor Charles A. Graves, of the University of Virginia, on "The Forged Letter of General Robert E. Lee;" and by Samuel T. Graham, assistant United States attorney general. The following officers for the ensuing year were elected: President—Leigh R. Watts, of Portsmouth. Vice-presidents, Raleigh C. Blackford, Lynchburg; H. R. Kern, Winchester; Robert L. Pennington, Jonesville; Bernard Mann, Petersburg; S. O. Bland, Newport News. Executive committee—Captain John A. Coke, Richmond; Lewis C. Williams, Richmond. Secretary and treasurer—John B. Minor, Richmond.

CHIEF JUSTICE BEATTY DEAD.—Chief Justice William Henry Beatty of the Supreme Court of California, one of the most eminent lawyers in the country and a pioneer of California, died on August 4 at his home in San Francisco. The death of Chief Justice Beatty marks the final chapter in one of the most illustrious lives in the history of the California bar. If he had lived to the expiration of his present term, January, 1915,

he would have completed his twenty-sixth year of continuous service as chief justice. Owing to his long ill health and also in view of his extended term of office, he had announced several months ago his intention of stepping aside at the conclusion of his present term. Chief Justice Beatty was born in Lucas County, Ohio, February 18, 1838, going to California with his parents in March, 1853, by way of the isthmus. Inspired by the achievements of his father in the practice of law, William returned to the East to complete his education, entering the University of Virginia in 1856. In September, 1858, he returned to California and became the law partner of his father in Sacramento. In 1863, following the example of his father, he went to Nevada to practice, and in the following year served as district judge at Lander, continuing in office until 1874. From 1879-80 he served as associate judge of the Nevada Supreme Court. Shortly after the expiration of his term on the Nevada Supreme Bench he returned to California, and in 1889 was elected chief justice of the California Supreme Court, which he filled continuously until the time of his death. His long term of public service and his sterling, irreproachable character made him one of the most widely known men on the Pacific coast.

OTHER DEATHS.—In addition to the recent deaths heretofore mentioned in this column, the following have been noted: July 10, at Lamesa, Tex., J. M. Baker, former County Judge of Dawson County, Texas; July 11, at Dublin, Ga., Kendrick J. Hawkins, judge of the Dublin judicial circuit; July 13, at Knoxville, Tenn., John W. Drummond, judge of the Knox County (Tenn.) Court; July 15, at Avon, N. Y., William Carter, aged 66, county judge and surrogate of Livingston County, New York; July 21, at Chillicotte, Mo., Julius F. Howard, aged 91, former county judge of Livingston County, Missouri; July 28, at Philadelphia, Pa., Louis A. K. Mellon, aged 32, judge of the Municipal Court of Philadelphia; July 29, at Clinton, Ky., R. L. Smith, judge of the Kentucky Circuit Court; July 30, at Norristown, Pa., Henry K. Weand, aged 76, judge of the Montgomery County (Pa.) Court; August 6, at Red Wing, Minn., Axel Haller, aged 56, judge of probate of Goodhue County (Minn.) for twenty years; August 6, at Chardon, O., Henry Kenton Smith, probate judge for more than forty-two years; August 8, at Chicago, Ill., John T. Hanna, aged 76, formerly judge of the Iowa Circuit Court.

English Notes.

APPOINTMENTS.—Jonathan Pim, K. C., has been appointed Attorney-General for Ireland, in succession to Serjeant Moriarty, promoted to the bench. James O'Connor, K. C., has been appointed Solicitor-General for Ireland, in succession to Jonathan Pim, K. C.

COMPENSATION TO WORKMAN AS A PREFERENTIAL DEBT.—The question raised in the recent case of Re Jinks turned on the enactment contained in section 5, sub-section 3, of the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58). The benefit afforded by the Preferential Payments in Bankruptcy Act 1888 is thereby extended to a workman who is injured by accident arising out of and in course of his employment. There is to be paid in priority to all other debts of a bankrupt employer "the amount, not exceeding in any individual case £100, due in respect of any compensation the liability wherefor accrued before the date of the receiving order." Proof for the amount of taxed costs as well as of compensation was put in in the case of Re Jinks (ubi sup.). But the same divisional court as decided the case of Re Hollis and Son (ubi sup.) came to the conclusion that only proof preferentially for the amount due in respect of compensation properly so called ought to be admitted. The words "the amount due in respect of any compensation" did not, their Lordships thought, include the amount of costs and charges incurred in recovering the compensation. The rigidity of the statutory language may be such as compelled the court so to decide. But it is much open to doubt whether, according to the intentions of the legislature, a right decision has been arrived at on this point.

THEATRE TICKETS AS LICENSES.—By their decision in Hurst v. Picture Theatres, Limited, the court of appeal have struck another heavy blow at the authority of Wood *v.* Leadbitter. In that case it was decided as long ago as 1845 that a right to come and remain for a certain time on the land of another can be granted only by deed; and a parol license to do so, though money be paid for it, is revocable at any time and without paying back the money. From time to time that case has been "distinguished" and "doubted," and it would seem that at the present time, having regard to the Judicature Act and the various decisions which have been given, Wood *v.* Leadbitter must be considered for all practical purposes to be obsolete. In Hurst *v.* Picture Theatres, Limited, it was contended that if a person paid for a ticket to a theatre to see a particular performance, had taken his seat, and was behaving properly, the proprietors of the theatre could lawfully call upon him to withdraw before he had seen the performance. Needless to say, this view did not commend itself to Mr. Justice Channell, and Lord Justice Buckley described it as contrary to good sense and contrary also to law as administered since the Judicature Act. Putting aside all the earlier technicalities, it is clear that a visitor to a theatre who has paid for his seat has a right to retain that seat during the performance so long as he behaves himself and complies with the reasonable regulations of the management. As Lord Justice Buckley tersely puts it: "A license, coupled with an agreement not to revoke it for good consideration, confers an enforceable right, and the grant of a right to enter upon premises and see a spectacle includes a contract not to revoke until the performance is ended."

FORENSIC AND JUDICIAL LONGEVITY.—The death in his hundred and fourth year, on July 13, of Mr. William A. Gordon Hake, the Father of the Bar, to which he was called nearly eighty years ago, directs attention to several instances in forensic and judicial annals of extraordinary longevity. Lord Brougham at his death in 1868 had all but completed his ninetieth year. Lord Lyndhurst at his death in 1863 had entered on his ninety-second year. Lord Plunket, the famous Irish Lord Chancellor and orator, at his death in 1854 was within a few months of the completion of his eighty-ninth year. Mr. Thomas Lefroy presided in the Irish Court of Queen's Bench till 1866, when he was past ninety, and died in 1869 in his ninety-third year. In our own time Sir James Bacon retired from the Bench hale and hearty, at the age of eighty-eight, in 1886, and died of old age in 1895. Mr. Robert Holmes, an eminent leader of the Irish Bar, who declined not merely a silk gown, but the Solicitor-Generalship for Ireland, which was pressed on him, was Father of the Irish Bar at his death in 1859 in his ninety-fourth year. Mr. Thomas de Moleyns, Q. C., who was also Father of the Irish Bar, died in 1900 in his ninety-fourth year. Mr. James Fitzgerald, who was Prime Serjeant at the Irish Bar and a very remarkable personality first in the Irish House of Commons and then in the Imperial House of Commons, at his death in 1835 was ninety-four. The last surviving member of the Irish House of Commons was a barrister, Sir Thomas Staples, Bart.,

Q. C., who at his death in 1865 was ninety. In the last century two members of the bar, the one in immediate succession to the other, occupied the position of Father of the House of Commons—the Right Hon. C. P. Villiers, who died in 1898 in his ninety-seventh year, and the Right Hon. Sir John Mowbray, Q. C., who died in 1899 in his eighty-fifth year. Mr. Villiers and Sir John Mowbray had both filled the position of Judge-Advocate-General when that office was a Ministerial post whose holder resigned on a change of Government.

POLITICAL V. LEGAL CAREERS.—Sir Edward Clarke, in his speech at the dinner given by the bench and bar at Lincoln's-inn, on July 17, in his honor on the occasion of his retirement from practice at the bar, admitted his audience into his confidence by some delightful self-revelations. He went to the bar, he said, from a belief that he would be able thereby to make his way to political influence and position. The ambition of many eminent legal and judicial celebrities, on the contrary, has been centered on the attainment of professional as distinguished from political success. Lord Mansfield, had he so desired, would unquestionably have been a Prime Minister. The late Lord Macnaghten and the late Lord Ashbourne were offered, but declined, the great office of Secretary of State for the Home Department. Lord Fitzgerald of Kilmarnock, as Lord of Appeal in Ordinary, who was for many years a judge of the Queen's Bench Division in Ireland, and Sir Andrew Porter, a late Master of the Rolls in Ireland, were offered, when holding the office of Attorney-General for Ireland, the position of Chief Secretary for Ireland, with a seat in the Cabinet, which they declined. Mr. Perceval, and in our own time Sir William Harcourt, Sir John Gorst, Mr. Matthews (Viscount Llandaff), and Mr. Birrell abandoned a forensic for a political career with conspicuous success. Mr. Asquith on one occasion stated in the House of Commons that in his early years of Parliamentary life he never aspired, even in imagination, to a political career. Politics, on the other hand, have been abandoned after the attainment of distinction for the practice of the bar and for judicial office. Mr. Benjamin, who had a great political career in America, subsequently settled down to practice at the English bar. Mr. Pitt had determined, if the election of 1783 had gone against him, to practice in stuff as an ex-Prime Minister at the bar. Grattan, after he had established the Irish Constitution in 1782, had resolved to resume his practice in stuff at the Irish bar, and was only hindered from the carrying out of his intention by a grant voted to him by the Irish Parliament, which he with very considerable hesitation accepted. Judicial promotion has at times been the sequel to the holding of high political office. The present Lord Chancellor is an ex-Secretary of State for War. Lord Campbell, from the position of Chancellor of the Duchy of Lancaster, became Lord Chief Justice, and eventually Lord Chancellor. Lord Dunedin, the Lord Justice-General of Scotland, is a former Scottish Secretary and Cabinet Minister.

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Obiter Dicta.

UNRIPE FRUIT.—Berry *v.* Green, 4 S. Ct. (U. S.) 696.

THE SERPENT GETTING IN HIS WORK.—Vice *v.* Eden, 113 Ky. 255.

INTOXICATING AND OTHERWISE.—Beers *v.* Strong, Kirby (Conn.) 12; Beers *v.* Root, 9 Johns. (N. Y.) 264.

THE WORM TURNED.—Schreiber *v.* Worm, 164 Ind. 7, was an appeal from the judgment rendered in Worm *v.* Schreiber.

A SYLLABUS—THAT'S ALL.—"Where the vital fact in a case was how far a train was from a land slide into which it ran when the land slide occurred, it was not competent, etc."—See Louisville, etc., R. Co. *v.* Murphy, 150 Ky. 176.

CARRYING OUT A SIMILE.—"In every case in which there is doubt the juries are the doctors." Per Russell, J., in Leverette *v.* Jeffries, 8 Ga. App. 798. And, forsooth, since the judge has the last word, he must be the undertaker.

WELL BRIEFED.—"As this case was tried by the court, and as upon the undisputed facts in the case the judgment was for the right party and could not have been other than it was, it becomes unnecessary to note the points made in brief of counsel, which do not affect the merits of the case." See Frederitzie *v.* Boeker, 193 Mo. 228.

AS MIGHT BE EXPECTED.—We glean from the meager facts detailed in Spiller *v.* Close, 110 Me. 302, that Spiller gambled and lost his money to Close, who kept it. Mrs. Spiller, whose name was not Spiller before she married, brought suit to recover the money, but the court upheld the right of a man to be close in money matters under such circumstances.

MORE JUDICIAL KNOWLEDGE.—"The court is not wholly unaware of the fact, which is a part of the knowledge common to mankind, that a lover's 'tiff,' brought on by circumstances similar to those which produced the one here, is frequently followed by an agreement to 'play quits,' and that the return of mementoes and insignia of the betrothed state, like letters, follows and puts a period to the agreement to marry." See Vaughan *v.* Smith, 177 Ind. 118.

ESTOPPEL OF WOMEN.—It is a well-recognized prerogative of woman to change her mind at will. Put in a legal way, the same idea might be expressed by saying that a woman is never estopped. Judge Lamm must have had such a thought when he wrote as follows in Blake v. Meadows, 225 Mo. 29: "We cannot agree to apply the rule of estoppel harshly and with close particularity under any and all circumstances where the marital relation is involved. Such holding would injure the very class the married women's acts were intended to protect and would not subserve the welfare of society. The personnel of those involved in estoppel must not be lost sight of, and it is not unreasonable to hold that facts sufficient to estop a Socrates or other 'lord of creation' would not estop Susan, Jane and Mary—good Missouri mothers all."

OBVIOUSLY SARCASTIC.—In Georgia, etc., R. Co. *v.* Sasser, 4 Ga. App. 276, it was urged that the trial court, in instructing the jury, had used the word "obvious" and thus stated the law "too strongly" against the defendant. Judge Powell disposed of this contention as follows: "'Obvious' is a pretty strong-sounding word. Its chief juridic employment, so far as my observation goes, is by judges of courts of review, who gener-

ally pronounce obvious those propositions (evolved perhaps with many concealed misgivings) which they are able to support with but sparse array of precedent and which they are unwilling to put forth as an original dictum without the supporting influence of some strong, impressive, faith-bearing word—for a proposition weak in substance is oft aided in appearance by the strength of sonancy, and 'obvious' is a sonant word. However, this word is not absolutely interdicted to the trial judges; and in proper cases they may use it cautiously, if the facts are sufficient to justify it."

DAMAGING EVIDENCE.—The chief bone of contention in Bost *v.* State, 64 Tex. Crim. 464, was whether the defendant had promised to marry the prosecuting witness. One of the strongest pieces of evidence against him seems to have been a postcard sent by him while on a business or pleasure trip away from home. By way of caution against careless indulgence in the postcard fad, we quote the following description of this particular card from the court's opinion: "The card is just such a picture postcard as is commonly in use and has been for a long time in this country. On the face of it, on the right-hand end, just under this in print, 'this side for the address only,' it is addressed 'Miss Alma Whitaker, Petrolia, Tex.' On the other end under this in print, 'this space may be used for writing' this is written: 'Hello kid, how are you—I am living high—I haven't went with a girl since Ive been here. I going some ant I. So bye bye. Bert.' And on the face of it is the clear postmark used by the postmaster canceling the one cent stamp showing the office where mailed. This postmark is 'Dublin, Texas, July 31, 3-PM, 1909.' On the other side of the postcard is a picture of a large diamond ring. Standing within the ring is a young man clasping in his embrace a young lady and kissing her. To the back of this scene are flowers, a road, the green grass and the picture of a nice residence. Around the margin and on the ring is written: 'Say kid how does that look to you? It looks good to me, don't it to you?' Around the outer edge of this side of the postcard this is written: 'Well kid, I will be back the last of next week if business don't pick up and I don't think it is—the way things look.' Then underneath the picture of the girl and young man above stated is this verse of poetry:

'Near your home where as children oft we've strayed,
Plucking flowers all wet with dew;
I've won you, and kissed you, my pretty maid,
And this Ring shall whisper, he's ever true.'"

A SCRIPTURAL DISSENT.—In Moreno *v.* State, 64 Tex. Crim. 673, Davidson, P. J., dissenting vigorously from the doctrine that the court should judicially know "beer" to be intoxicating, thus rakes the majority of the court fore and aft with a rapid scriptural fire: "It has not been heretofore determined that the mere fermentation of liquids could form the basic principle of governmental authority by which the citizenship of the state should be rendered infamous for the sale of the Old Plantation 'potato beer' or, therefore, the Old Black Mammy of our Southland should be incarcerated in the penitentiary for manufacturing and selling her brew of 'persimmon beer.' A wise man once upon a time said 'because the Preacher was wise he still taught the people knowledge; yea, he gave good heed and sought out and set in order many proverbs.' Ecclesiastes, chap. 12, verse 9. The wise Preacher again recorded that he 'gave his heart to seek and search out by wisdom concerning all things that are done under the heavens,' and reached the conclusion that 'the thing that hath been, it is that which shall be; and that which is done is that which shall be done; and there is no new thing under the sun.' Same, chap. 1, verse 9. This solemn declaration may have been considered the enunciation of concrete truth when written by 'the Preacher the son of David, king of Jerusalem,' but he did not forecast that the 'time will come when they will not endure sound doctrine, but after their own lusts shall they heap to themselves teachers, having itching ears; and they shall turn away their ears from the truth, and shall be turned unto fables.' 2 Tim., chap. 4, verses 3 and 4. Nor did the wisdom of Solomon comprehend that after many centuries that knowledge would so increase and wisdom so augment itself that old things would pass away and all things would become new 'under the sun.' It may be that the prestige of the royal 'Preacher' will become a reminiscence only to be remembered in Sunday school lore. The Saviour, while upon earth, by his first miracle at Cana of Galilee, converted water into wine, but it is left for the latter day miracle-working power to convert all fermented liquids into intoxicating beverages."

LEAVING HIM IN PURGATORY.—A recent decision of the Supreme Court of Alberta, passing on the application of a disbarred attorney for the restoration of his name to the roll of barristers, deserves at least partial quotation in this column. Said Mr. Justice Stuart:

"My view of this application is that it has been made too soon and should not now be allowed. . . . I wish to say that I have already read with some degree of incredulity the expressions used in a number of the English cases about solicitors who have been struck off the rolls exhibiting signs of repentance and of a determination to adopt a higher moral standard of action. They make me think at times of Pickwick and at times of Pecksniff. There is just a touch of the pharisaical about them. I should hesitate to sit solemnly in court and scan the record for signs in a solicitor of fifty years of age of that spiritual change which is called repentance. Even if the anticipated change is merely to be a moral as distinguished from a spiritual one, how is the court to discern the signs of such an inward reform? If upon being struck off the rolls a solicitor retires to a farm and follows the plow or handles the hay fork, you do not have any very excellent opportunities of discerning signs of repentance and reform. In reality all you can say is that, so far as reported, he has done nothing dishonorable in the meantime.

"In the next place, I think it is improper to say that there is nothing in the way of discipline or punishment involved. Are we to assume that discipline can never have any effect at all, or that if the required effect is not produced by one infliction, there must never be any hope or expectation of any good effect from a second and much severer infliction? Even among men whose outward conduct is of the highest, there would, I think, be found considerable unwillingness to have a revelation of how much of it is superinduced by fear. And at this point I may observe that the severity of my language in giving the judgment of the majority of this court in June, 1911, quite apart from the resulting action, is, in my view, to be considered in one respect as disciplinary in the way of stern rebuke, and not as an infallible, permanent, and irrevocable moral judgment which has raised for ever an impassable barrier. The Olympian thunder consigned the solicitor, in my opinion, not to an Inferno, but to a Purgatorio. A return to the pure and rarified air of what is no doubt to him almost a Paradiso, is not eternally shut off. The return, while not impossible, ought of course not to be too easy. . . . In view of the gravity of the offence, I think the punishment should continue, that a refusal at present will serve to burn into the mind of the solicitor a realization of what is demanded of him, and that he should endure with fortitude the passing of, say, another year, when, if nothing dishonourable is reported in the meantime, he might be restored to the rolls."

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Law Notes

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The Obligations of Neutrality.

The New York *Evening Sun* deprecates what it considers the indiscreet zeal of the peace propagandists in this country, fearing lest their agitations and ill-advised proposals for ending the European war may lay us open to the charge of violating our obligations of neutrality and destroy our possibilities as peacemakers when the proper time for mediation arrives. In a recent editorial under the title "Discretion in the Dove" the *Evening Sun* says:

"Peace meetings of enthusiasts, like a recent one in this city, at which there were advanced proposals even so absurd as that of sending President Wilson over at once to settle up the European war, are earnest but ill advised. Ubiquity of this sort, even in irresponsible quarters, may end in destroying entirely America's possibilities as a peacemaker when the proper occasion comes. The United States Government is on record at all the warring capitals with an offer of its good offices, now or later, and upon this it should stand. There is every likelihood that the Government will do so. But agitations of private bodies toward hastening a peace before those actively concerned are ready for it approaches a violation of neutrality, because it is selecting a stage of the conflict not determined by military exigencies to stop hostilities, at the forfeit by one side or the other of advantages about to be gained. Level-headed persons should know that either side which feels that it is gaining such an advantage is not going to listen to proposals which would frustrate it, and the insistence upon this at this critical time amounts to lining us up on that side which has most to lose by a continuance of the war. The result would be to render the opposing nations so impatient that we should be only contributing hostility instead of amity. Americans without exception are eager for peace. But since the United States Government opened the way for negotiations at the beginning, the next move lies only with those who will have reason to negotiate. Before that time citizens of this country should be very cautious about violating their obligations of neutrality even in the interests of peace."

These are undoubtedly counsels of wisdom. The issues in the great conflict across the sea are so momentous that it may be they are not to be otherwise determined than by a final and conclusive arbitrament of arms. It certainly is not for us to meddle in the controversy or to assume the position of mentors over the warring parties. Nevertheless, America is vitally interested in the peace of Europe, and to most Americans the thought of the protraction of the internecine struggle is intolerable. Among the neutral Powers America's influence in the present crisis is paramount. It must be the ardent hope of all that ways may open for the legitimate exercise of that influence in the interest of European peace.

Shirt Sleeves in Court.

On an excessively hot day in St. Louis recently an attorney in defiance of the properties of the courtroom removed his coat. He was ordered by the court to put it on or leave the courtroom. Indignant over this invasion of what he considers his inalienable and constitutional rights, he has brought the matter to the attention of the Missouri Code Revision Committee, which is now in session, praying that somewhere in the revised code it be fully and fairly set forth that lawyers, litigants and others whose business takes them into a courtroom shall be at liberty to remove their coats in hot weather. Since a number of the members of the code revision committee are St. Louis lawyers and therefore fully advised as to the torridity of the summer climate in that metropolis, the petition for shirt-sleeve rights may be not unfavorably received. It does not meet the situation to say that there are thin, light-weight coats adapted to summer wear. Many lawyers, as is well known, have but one coat, which, for obvious reasons, being selected for qualities that wear well, is of such weight and close texture as to make it an instrument of torture when worn on the torrid days of the summer solstice. We much fear, however, that the demands of court etiquette will prevail with the code revision committee over all considerations looking to the comfort of the legal fraternity. Our aggrieved St. Louis attorney might have reached his goal by indirection. He might have appealed successfully to the committee for a code requirement that attorneys should wear gowns in court. The gown would comport admirably with the dignity of the court, and its loose kimono-like folds might easily be made to conceal a minimum of clothing underneath.

The "Third Degree."

The upper house of the Georgia legislature has passed a bill making the police inquisition known as the "third degree" unlawful. The "third degree" is a lawless contribution which the police of this country have made to our criminal procedure. It is a secret sweating process to which the prisoner is subjected by the police, before trial, for the purpose of wringing from him a confession of guilt. Every kind of mental torture is used—sometimes even physical torture—to wear the victim down or confuse him into any kind of confession. This sort of

inquisition is and always has been unlawful. The courts have set their seal of disapproval upon it by refusing to receive in evidence confessions made under duress. It has, however, become a part of the police system of the country, and direct legislation will doubtless be necessary to dislodge it. The splendid example set by the Georgia legislature should be followed in every state in the Union. In a land where it is the proud boast that every man has a right to a free, impartial and unintimidated trial in court there is no place for the "third degree." Nor does such police inquisition comport with the more humane treatment of criminals. It is an anachronism. It belongs to the age of the rack and the thumb-screw, and should be consigned to the same limbo of the obsolete and the discredited.

Expediting Decisions on Appeal.

Justice George L. Bunn of the Minnesota Supreme Court in a recent address before the state bar association gave an intimate description of the working of the state's highest court, showing how and why the court has been enabled to keep its calendar clear and its business up to date.

"The Supreme Court of Minnesota," said Justice Bunn, "has adopted the policy of prompt decisions of the cases submitted to it. Consultation takes place immediately after the day's arguments, and the decision is reached and the opinion is written while the case is fresh. There are constant consultations, formal and informal, until the conclusion is arrived at. The judge who writes the opinion writes it before the case gets cold, and his associates review and correct his opinion before they have forgotten the arguments. The absence of long delays does not mean snap judgment or ill-considered decisions. It does mean working at white heat while the facts are fresh and before the case is driven from the minds of the justices by other work and the lapse of time."

The Minnesota Supreme Court procedure as thus outlined by Justice Bunn is creditable to the court, and may well be commended to other appellate courts. In many of these cases the undue delay in the hearing and decision of cases caused by the congested calendars is a constant source of grievance to both litigants and counsel. Justice delayed is often justice denied. Just now the Supreme Court of the United States, led by its indefatigable chief justice, is setting a splendid example for the state supreme courts in the rapidity with which it is disposing of pending cases. Chief Justice White is ambitious soon to have the court abreast with its docket so that there will be no cases pending and undecided from previous terms. If this is accomplished it will be little short of a miracle of industry, in view of the congestion of cases in that court in years past.

Moving-Picture Censorship.

Judge Martin of the Philadelphia Court of Common Pleas has upheld the Pennsylvania act creating the moving-picture censorship, refusing to grant the injunction asked to restrain the chief censor and his assistants from enforcing the provisions of the act. The suit for an injunction was brought by various film corporations whose contention was that the censorship act was unconstitutional and an unlawful interference with interstate commerce. Judge Martin ruled adversely to this contention, holding that the act was a proper exercise of the police power of the state, enacted to conserve the morals and manners of the public, and as such its purport was within the scope of legislative authority. In his opinion Judge Martin says: "It is alleged in each of the bills of complaint that none of the moving pictures, films or reels owned by the plaintiffs, and rented or intended to be rented in the Commonwealth, or exhibited, are sacrilegious, obscene, indecent, immoral, or such as tend to corrupt morals, but, on the contrary, are moral and proper. If such be the case, it will be presumed that they will be passed by the censors, and while complaint is made of anticipated inconvenience and expense, plaintiffs have made no attempt to comply with the terms of the act, and it is not possible to determine in advance that it is impractical to carry out its provisions."

Official censorship over moving-picture shows has already been established in a number of the states of the Union and in many cities, and a bill is pending in Congress to create a federal motion-picture commission for licensing films. In New York there is a voluntary board known as the National Board of Censorship of Motion Pictures, which issues publications giving its policies and standards of judgment, and which is working in harmony with manufacturers, importers and exhibitors. There are upward of 18,000 motion-picture houses in the United States, and the pictures in these houses are daily seen by about 10,000,000 people or by a tenth of the entire population of the country. Rightly conducted, therefore, these motion-picture theatres can be of great public educational and cultural value. On the other hand it can easily be seen that they may become a menace to the public morals and taste if an unlimited license is permitted to the managers in the matter of their public offerings. In favoring a rigid censorship of moving-picture films emphasis need not be placed upon the moral aspect of the question. Many who go to the moving-picture show have no fear for their morals, but they frequently have occasion for resentment at the insult to their intelligence and taste and at the utter boredom that is imposed upon them by the banal and inane stuff that is thrown upon the screen.

Right of Husband to Custody and Control of Wife.

Some rather reactionary doctrine in the law of husband and wife was laid down by the trial court in a recent Colorado case. The jury were instructed that "A husband without warrant of authority, and over the protest of the occupant, has a right to enter the house or houses of any person whomsoever, for the purpose of talking with and procuring his wife, and against her will, to leave such house if he so desires." The jury were also told that "A husband may over the protest of the occupant of the house, and over the protest of the wife of the husband so entering, not only enter any man's house, but has a right also to use such reasonable force and persuasion as may be necessary to cause the wife to leave the house of her mother and come back to his home with him, and that no person, not even her brother, has a right to interfere with him in the exercise of such reasonable force of persuasion." Both of these instructions were condemned by the Supreme Court of Colorado (*Bailey* v. *People,* 54 Colo. 337) as embodying propositions not sanctioned by the law in this country. The trial judge

was doubtless familiar with his Blackstone, and in formulating the instructions took a leaf from the pages of that great legal luminary. Under the old common law the status of a married woman was one of lost identity and legal disability. Her husband not only had the right to control her acts and her will, but might even give her moderate correction. "For," says Blackstone (Com. Bk. 1, p. 444), "as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children." That the common law ever gave the husband the right to chastise the wife has, however, been questioned. Hale, C. J., says, in *Lord Leigh's Case,* 3 Keb. 433, that the "salva moderata castigatione" of the Register was meant not of beating, but of admonition and confinement to the house in case of the wife's extravagance. And Lord Halsbury, in *The Queen* v. *Jackson,* [1891] 1 Q. B. Div. 671, said that whether or not the word "castigatio" would bear the free translation given to it by Lord Hale he was glad that some one even at that early period thought it inconsistent with the rights of free human creatures that such a power of personal chastisement of the wife should exist.

That the wife, under the old common law, was subject to the authority of her husband and that he had the right to the custody of her person, has never been questioned. This right of control and custody was recognized as late as 1840, in the case of *In re Cochrane,* 8 Dowl. P. C. 630, wherein it is held that where a wife absents herself from her husband, on account of no misconduct on his part, and he afterwards, by stratagem, obtains possession of her person, and she declares her intention of leaving him again whenever she can, he has a right to restrain her of her liberty until she is willing to return to a performance of her conjugal duties. This harsh doctrine was, however, repudiated fifty years later in the case of *Reg.* v. *Jackson,* [1891] 1 Q. B. 671, wherein it was held that where a wife refused to live with her husband, he was not entitled to keep her in confinement in order to enforce restitution of his conjugal rights. Legislation in England has in recent years much ameliorated the condition of a married woman before the law. The suffragettes may compel Parliament to go further in improving her legal status. In the United States the common-law fiction of the legal unity of husband and wife, and the corollary doctrine that the husband has the right to control the acts and will of the wife, have not been favored. The law which attached such subjection to the legal status of a married woman has in many jurisdictions been abolished by direct legislation. In others it has disappeared under the continuous pressure of judicial interpretation.

Corporation as Legal Practitioner.

That a corporation cannot practice law has been reaffirmed in a recent decision by Justice Kelly, of the Kings County Supreme Court, New York, (*U. S. Title Guarantee Co.* v. *Brown*) in which he holds that contracts of retainer made by a title insurance company with property owners to institute and carry through condemnation proceedings are in contravention of public policy and also in violation of section 280 of the Penal Law of New York. It appears that the plaintiff title insurance company, prior to 1910, entered into more than three hundred and fifty contracts with owners of realty in various counties of the state whereby the plaintiff agreed with the owners to take whatever proceedings were necessary in obtaining an award for the taking of their property by the city of New York for its water supply system, and agreed with the owners to receive in payment a percentage of the compensation received for the property so taken. In pursuance of these contracts the trust company retained the defendant, an attorney, to act as attorney of record for the various owners with whom it had made the contracts. Justice Kelly's ruling holding the contracts of retainer illegal was made in a suit by the trust company against the defendant attorney for an accounting. The ruling finds ample support in the New York statute (§ 280 Penal Law) which plainly prohibits corporations from practicing law or rendering legal services of any kind. The decision is of general interest, therefore, only so far as it declares such contracts to be in contravention of public policy. This question was considered by the New York Court of Appeals in the case of *In re Co-operative Law Co.,* 198 N. Y. 479, 19 Ann. Cas. 882, 92 N. E. 15, 139 Am. St. Rep. 839, 32 L. R. A. (N. S.) 55. It is therein held that a corporation cannot be admitted to the bar; and, as it cannot practice law directly, it cannot do so indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate. Vann, J., speaking for the court in this case said: "The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice for it, and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counselor at law. The corporation might not have a lawyer among its stockholders, directors or officers. Its members might be without character, learning or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state. A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it."

This is sound doctrine, and a vigorous insistence upon and application of it are necessary if the present manifest

trend toward the commercialization of the law is to be checked. Trust companies and other business corporations, with their well equipped legal departments, are absorbing more and more of the law business in the large centers. No distinction is made by these corporations between law business and any other business handled, except, perhaps, as to the fees charged. The avails all go into the coffers of the corporation, its legal attachés who render the legal services being little more than high-class clerks in the one great business institution. It cannot be said, of course, that this situation necessarily jeopardizes the client's interests, and it may be in the line of business evolution. Lawyers, however, with old-fashioned ideals of the profession cannot but see the seeds of its degradation in a situation where the lords of business reap bounteously in fields where they have not sown, leaving only the gleanings of the harvest to those who have laboriously prepared the soil.

The Case System of Law Reporting.

John Bassett Moore, lately counsellor of the State Department, in a recent address before the alumni of the law school of the University of Pennsylvania animadverted severely upon the system of law reporting in the United States. "With every court," said Professor Moore, "there is connected a pipe to convey its product to the centers of distribution, and day by day, month by month and year by year, there is poured out as through a great main upon a gurgling, sputtering bar a turgid stream of judicial decisions. The Bench is inspired with the idea that in writing opinions covering, with generous impartiality, cases of national interest, local interest, and no interest whatever, it is making valuable contributions to the American corpus juris; in fact, it is creating a legal chaos, buttressed by shapeless masses of indexes which it would be fulsome praise to call digests." The obvious fault of this system, as pointed out by Mr. Moore, is that discrimination, such as would establish or be applicable to broader principles of law, is almost entirely lacking. The lump publication of decisions upon both petty and important cases, of purely local as well as of national interest, deprives the bar of guidance in the essentials of justice by furnishing them with a wealth of possibly trivial precedents.

The evil in our system of law reporting which Mr. Moore deplores has long been recognized, and more than one cure for it has been proposed. The general codification of the case law of the country has been a perennial subject of discussion among lawyers and publicists. Codification, however, is such a monumental task that the subject is likely to be indefinitely confined to academic discussions. There has also been advanced the very radical plan of doing away with case law altogether; that is, a plan to have the several states of the Union adopt a code of the Continental type under which each case is decided by the court irrespective of how other cases bearing upon the same point have been decided. This way of deciding cases would hardly become popular in this country. We have become too firmly wedded to the system of legal precedents. Precedent, indeed, is of the very essence of our jurisprudence. It should not be overlooked, moreover, that the law of precedents makes for uniformity in the administration of the law. The most ready relief from the Serbonian bog of case law in which we are floundering will doubtless be found along lines suggested by Mr. Moore himself. Why, he asks, rely on volumes of unassimilated cases instead of on principles as illustrated and applied in a few really important and well-reasoned opinions? Why, indeed? What appears to be needed is a rigid legal censorship that will exclude from the published reports a great mass of decisions that now find their way there and that serve only to enslave and debauch.

THE RIGHT TO APPOINTMENT OF A RECEIVER PENDENTE LITE IN MORTGAGE FORECLOSURE PROCEEDINGS

A common form of relief asked upon the institution of proceedings for the foreclosure of mortgages is the appointment of a receiver to take charge of the mortgaged premises, and collect the rents, issues and profits arising therefrom to be held and applied upon any deficiency arising upon the sale of the property. It is not an uncommon thing to find in a mortgage an express stipulation to the effect that upon default in the due payment of the debt, the mortgagee may, upon the institution of foreclosure proceedings, have a receiver appointed forthwith. Where such a provision does not exist, it is common to ask such appointment upon the ground that there has been a depreciation in the value of the mortgaged premises and that the security has thereby become inadequate, or that the mortgagor is committing waste upon the premises. The right to such relief becomes an interesting question in those jurisdictions where, under ordinary circumstances, the mortgagor is by law entitled to possession until a completed foreclosure and sale of the premises as provided by law.

In considering the question suggested, it is well to advert to the fact that at common law a mortgage was in fact a conveyance of the legal title to the premises. The mortgagee became possessed of the full legal title, and entitled to the immediate possession thereof unless otherwise agreed with the mortgagor at the time of making the mortgage. Being possessed of the full legal title, his right could only be defeated by the performance by the mortgagee of a condition subsequent, such as the payment of money, or the performance of such other act as might be stipulated as the condition subsequent. Upon the performance of the condition subsequent, the mortgagor became entitled to a re-conveyance of the legal title; upon his failure to perform the condition subsequent, the mortgagor forever lost his right in the conveyed premises. The hard and fast rule of the common law gave rise to the so-called equity of redemption. The equity court recognized the harshness of the rule and gave relief by permitting a redemption even after the failure to perform in accordance with the strict letter of the condition. So it is not strange that in our American states we find legislative enactments expressly modifying the common law rule and substituting therefor rules governing the redemption from mortgages upon much more liberal terms than would otherwise exist. In some states it is provided that the mortgagor shall be entitled to possession until a breach or default in the terms of the mortgage; in some

there are, or have been, legislative enactments that gave the mortgagor the right of possession until the expiration of the period allowed by law to redeem from the foreclosure sale; while in others there is a provision to the effect that a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale as provided by law.

It is self-evident that in those instances, and at those times, where and when the mortgagee is by law, whether by rule of the common law or by statutory enactment, entitled to possession as against the mortgagor, the party seeking the foreclosure of a mortgage ought to have the right to have a receiver appointed if he so elects instead of taking possession himself, to take charge of the mortgaged premises and collect the rents, issues and profits in order that they might be applied toward the satisfaction of the mortgage debt. But when is the mortgagee entitled to the appointment of such a receiver during the progress of the foreclosure proceedings, and prior to the time when the law says he is entitled to the possession of the mortgaged premises? There seems to be a common impression that the mortgagor may waive his right to possession during the period of redemption, where that right is given, or during the period when foreclosure proceedings are pending, when the law secures to him such right of possession, by inserting in the mortgage a provision that upon default in payment the mortgagee may have a receiver appointed with or without notice. To show the falsity of such notion, one needs only to read carefully the decisions hereinafter referred to, the brief being in no sense exhaustive, but complete enough to demonstrate beyond question the unmistakable position of the courts.

In the first case noted, *Wagar* v. *Stone,* 36 Mich. 364, there was no express provision in the mortgage authorizing the appointment of a receiver, but pending the foreclosure proceeding, the mortgagee sought and obtained the appointment of a receiver. Certain funds came into the possession of the receiver, and these funds were, under the direction of the court, paid into the registry of the court. Upon the sale of the mortgaged premises, there remained a deficiency, and this the mortgagee sought to satisfy by an application of the funds paid into the registry of the court by the receiver, which application the court refused. In approving this holding, the appellate court said:

"It has become the settled doctrine in this state that a mortgage conveys no title to the mortgagee. It is but a security for the debt, and until the title passes upon a foreclosure and sale of the property, the mortgagee has no legal interest in the land, and is not entitled to the possession. *Hogsett* v. *Ellis,* 17 Mich. 363; *Ladue* v. *Detroit & M. R. R. Co.,* 13 Mich., 380; *Van Husan* v. *Kanouse,* 13 Mich. 303; *Caruthers* v. *Humphrey,* 12 Mich. 270.

"The mortgagor is entitled to the possession during the proceedings taken to foreclose the mortgage and until a sale has been made and the title of the purchaser has become absolute, and until the title has become absolute upon a foreclosure of the mortgage an action of ejectment cannot be maintained by the mortgagee, his assigns or representatives, to recover possession of the mortgaged premises. 2 Comp. L., sec. 6263. Since the passage of this act, which prevents the mortgagee from obtaining possession until he has acquired an absolute title to the mortgaged premises, the mortgage binds only the land. The rents and profits of the land do not enter into or form any part of the security. At the time of giving the security both parties understand that the mortgagor will, and that the mortgagee will not, be entitled to the rents, issues and profits of the mortgaged premises, until the title shall have become absolute upon a foreclosure of the mortgage. Until the happening of this event the mortgagor has a clear right to the possession and to the income which he may derive therefrom, and the legislature by the passage of this statute contemplated that he should have such possession and income to aid him in paying the debt. It would be a novel doctrine to hold that the mortgagee had a right to the profits incident to ownership, and yet that he had neither a legal title or right to possession. The legislature, in depriving him of the means of enforcing possession, intended thereby also to cut off and deprive him of all rights which he could have acquired, in case he obtained possession before acquiring an absolute title. To deprive him of this particular remedy, and yet allow him in some other proceedings to, in effect, arrive at the same result, would be but a meaningless proceeding, and would not be securing to the mortgagor those substantial rights which it was the evident intent he should have.

"We do not overlook the fact that a contrary doctrine has been held elsewhere under a similar statute. We cannot avoid thinking, however, that for us to so hold would be but a mere evasion of our statute. We are of the opinion, therefore, that complainant was not entitled to the moneys paid into court by the receiver, as under our statutes such an officer could not be appointed."

In the next case, *Hazeltine* v. *Granger,* 44 Mich. 503, 7 N. W. 74, there were foreclosure proceedings had upon a mortgage which contained an express provision that, upon default, a receiver might be appointed without notice. Such a receiver was appointed upon an *ex parte* application, and he was directed to take possession of the premises and apply the rents under the directions contained in the mortgage. The defendant moved for a vacation of such order, and upon refusal, prosecuted an appeal. In reversing the order appointing the receiver, the court said:

"We think the court had no power to grant the order, which is unprecedented even under the old practice, both for requiring no security, and for having no basis of facts to authorize it. The courts in equity have no power to appoint receivers except 'when such appointment is allowed by law.' Comp. Laws, sec. 5070. There is no statute which authorizes the court to carry out *ex parte* any private agreement of parties outside of the usual course, or which would render its action valid in any case if it deprived a person of property or its control without such a hearing as is required to determine the right. Under the old practice existing at a time when the possessory right was deemed covered by a mortgage a court of equity would not interfere to grant a receiver unless two conditions coincided: *first,* that the premises were scanty security; and *second,* that the mortgagor was insolvent. *Brown* v. *Chase,* Walk. Ch. 43.

"Even this was regarded as contrary to public policy by your legislature, and in 1843 the old law was changed so as to secure the mortgagor in his possession until a foreclosure had become absolute. The effect of this as we

have several times decided was to prevent the mortgagee from obtaining under his mortgage any interest beyond that of a security, to be enforced only by sale on foreclosure, and to debar him from any right of possession. *Hogsett* v. *Ellis,* 17 Mich. 263; *Baker* v. *Pierson,* 5 Mich. 456; *Caruthers* v. *Humphrey,* 12 Mich. 270; *Crippen* v. *Morrison,* 13 Mich. 23; *Ladue* v. *D. & M. R. Co.,* 13 Mich. 380; *Van Husan* v. *Kanouse,* 13 Mich. 380 (303); *Newton* v. *Sly,* 15 Mich. 391; *Humphrey* v. *Hurd,* 29 Mich. 44; *Newton* v. *McKay,* 30 Mich. 380; *Wagor* (*Wagar*) v. *Stone,* 36 Mich. 364.

"The statute does not say that no ejectment shall lie unless there is an agreement to that effect, but that it shall not lie at all. Every mortgage made in common-law form contains words whereby, if applied as they read, possession would belong to the mortgagee and his title would become absolute by default. The whole aim of equity was to arrest this forfeiture and not to allow the language of a mortgage to have any force against the equity of redemption.

"The statute is a further step in the same direction for the protection of mortgagors against agreements which as literally drawn and as theretofore expounded, were deemed dangerous, and against public policy. The language of this mortgage expressly granting rents and profits on default is no stronger than previous words of grant, and is really narrowed. It was no doubt intended to go further and to evade the statute. If it had contained an agreement that ejectment should lie, it could not very well be enforced against the clause of the statute prohibiting it. It can have no greater force in enlarging the jurisdiction of equity to appoint receivers, which we held in *Wagor* (*Wagar*) v. *Stone* had been abolished. Any such attempt to create a forfeiture is contrary to equity and equity will not enforce it. The same principle which makes all original agreements void which destroy the equity of redemption in advance, must cover a partial as well as complete destruction.

"In *Batty* v. *Snook,* 5 Mich. 231, it was held that where an agreement was in fact a mortgage, an executory agreement to give up the equity of redemption on default was void, and would violate the doctrine which had annulled the common-law forfeiture. If mortgagees can evade the law by requiring a forfeiture of something a little less than the entire freehold, but nevertheless covering its usufruct, the beneficial effect of the previous equitable doctrine will be wiped out. We think the mortgage cannot be so enforced in equity as to deprive defendant of possession. As this is a mortgage of nothing but real estate, it is free from any questions which may possibly be mooted concerning other securities."

Let us review one more Michigan case before passing to another jurisdiction. The case of *Union Mut. Life Ins. Co.* v. *Union Mills Plaster Co.,* 37 Fed. 286, was an action brought in the United States Circuit Court for the Western Division of Michigan for the foreclosure of a mortgage. The appointment of a receiver to take charge of the assets and business of the defendant corporation and for the collection of the assets and profits by such receiver for application on the mortgage debt, was sought on the grounds that the property from disuse and wanton neglect of repair was going into dilapidation and ruin; that the buildings and machinery were suffering in value from want of proper care, and that the more movable property was being stolen or lost; that debts were suffered to accumulate, and that assets were appropriated by officers and agents of the corporation to their own private use; and that in consequence of the depreciation of the value of the mortgaged property, and the crippled condition of the corporation from the mismanagement of its officers, the mortgagee's security was greatly impaired, and was altogether inadequate to protect the debt. In holding that a receiver could not be had upon the sole ground of the inadequacy of the security when the statute gave the mortgagor the right of possession *pendente lite,* the court said:

"But it is claimed by the complainant—and, if the conduct which has thus far characterized the management of the affairs of the defendant company is to be continued, I think with strong reason—that the security is inadequate. While I am satisfied that some of the complainant's witnesses have greatly underrated the value of the mortgaged property, still the impression left upon my mind is that it is quite doubtful whether in the present condition of affairs the property is adequate as security for the debt. Upon this aspect of the situation, the complainant prays for the appointment of a receiver to take the rents and profits, to the end that they may be appropriated to the satisfaction of the mortgage debt; and there is thus presented a somewhat difficult, but very important question, touching the practice of the federal courts in Michigan in mortgage foreclosure cases, which, so far as I am aware, has never been expressly decided in these courts, and that is whether, in view of the law in this state in regard to the rights and relations of the parties to a mortgage of real estate to the mortgaged property, as declared by statute and expounded by the supreme court of the state, the mortgagee may, upon showing that his security is inadequate, have an appropriation of the rents and profits to help out the deficiency. The statute (How. Ann. St., sec. 7847) takes away from the mortgagee the right to the possession until foreclosure is completed by sale, and the sale has become absolute by confirmation. And it was held in *Wagar* v. *Stone,* 36 Mich. 364, that this statute, by implication, secured to the mortgagor the rents and profits pending foreclosure, and that therefore an appropriation of them by the hand of a receiver for the benefit of the mortgagee deprived the mortgagor of a substantial right. Notwithstanding this decision, the federal court in this district continued the practice of appointing receivers in such cases and for such purpose in the same way as had been customary in the early equity practice, and a number of precedents have been found in which my predecessor made such appointments after the practice in the state courts had been settled the other way. The matter does not appear to have been debated before him on any actual dispute shown by the record, but it cannot be doubted that so well informed a judge was cognizant of the ruling of the state court on the subject, and I am convinced that he followed the original practice upon the theory that it was a matter of practice merely, and that it was the duty of this court sitting in equity to follow its own course, instead of conforming to local practice regulations of the state; and such doubtless is the general rule. But it seems quite clear that the duty of following the original course of the court in equity does not extend to the extremity of overthrowing substantial rights. When it meets such it bends so far as is necessary to protect

them, but otherwise holds on in its customary way, simply adapting itself to the emergency. This is the doctrine which was so forcibly enunciated in the now familiar case of *Brine* v. *Insurance Co.*, 96 U. S. 627. The analogy of that case, and the applicability of the reasoning of the Supreme Court in deciding it, to the present question, are obvious, as I think, and lead to the conclusion that it is not a matter of practice simply; that the right of the mortgagor to the rents and profits *pendente lite* is a substantial one under the laws of Michigan, which must be recognized by the courts of the United States in administering the rights of parties to a mortgage. There is no practical difficulty in doing this, and matters of form must yield in the presence of legal right. I am aware that there are some decisions in the courts of the United States in which the principles of decision are inconsistent with those of *Wagar* v. *Stone, supra,* and which hold that the substantial right of the mortgagor to the rents and profits is not impaired in any legal sense by the appointment of a receiver to take them; the theory being that the hand of the court is to be regarded not as hostile, but as holding for the mortgagor as well, and turning over his property through judicial process to the payment of his just debt, when needed to meet a deficiency. It is not needful for me to express any opinion on this divergence of views in the present case, for the doctrine of adherence to the local law in real property matters looks to the rule adopted, rather than to the reasoning which has led to it, and I think that the law of the state as declared in *Wagar* v. *Stone* requires that it should be held here that a receiver of the rents and profits cannot be appointed, in mortgage foreclosure cases, upon the sole ground that the security is inadequate. Whether the court will appoint a receiver in foreclosure cases, where the property is being destroyed or wasted by the mortgagor, is an entirely different question. There is nothing in *Wagar* v. *Stone* which controverts the power and duty of the court to interfere in such cases for the protection of the security. What the court should do with any fund that might be left in the hand of the receiver, and incident to the dealing of the court with the property, might be a question subject to the control of the rule in *Wagar* v. *Stone,* but that question is not now presented. I should have, I think, no doubt that a receiver might be appointed in the circumstances last mentioned, if the waste or destruction was so serious as to justify so grave a step, but, as I have said, the facts are not so bad as to warrant it in the present case."

The opinion of the United States Supreme Court in the case of *Teal* v. *Walker,* 111 U. S. 242, 28 Law Ed. 415, which was an appeal, or rather proceedings in error to the Circuit Court of the United States for the District of Oregon, is an interesting one. In that case a deed absolute on its face, but intended as a mortgage, was executed contemporaneously with an agreement to re-convey upon the payment of the debt. The suit was brought to recover from the mortgagor the rents and profits arising while he was in possession. There being a recovery in the trial court, the Supreme Court reversed the judgment, and in so doing said:

"The case against the right of the defendant in error to recover in this case the rents and profits received by the owner of the equity of redemption is strengthened by section 323, chapter 4, title 1, General Laws of Oregon, 1843-1872, which declares that 'A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law.'

"This provision of the statute cuts up by the roots the doctrine of *Moss* v. *Gallimore, ubi supra,* and gives effect to the view of the American courts of equity that a mortgage is a mere security for a debt, and establishes absolutely the rule that the mortgagee is not entitled to the rents and profits until he gets possession under a decree of foreclosure. For if a mortgage is not a conveyance and the mortgagee is not entitled to possession, his claim for the rents is without support. This is recognized by the Supreme Court of Oregon as the effect of a mortgage in that state. In *Besser* v. *Hawthorn,* 3 Oreg., 129, 133, it was declared: 'Our system has so changed this class of contracts that the mortgagor retains the right of possession and the legal title.' See, also, *Anderson* v. *Baxter,* 4 Oreg., 105; *Roberts* v. *Sutherlin,* Id., 219.

"The case of the defendant in error cannot be aided by the stipulation in the defeasance of August 19, 1874, exacted by the mortgagee, that Goldsmith and Teal would, upon default in the payment of the note secured by the mortgage, deliver to Hewitt, the trustee, the possession of the mortgaged premises. That contract was contrary to the public policy of the state of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, and although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the state, it cannot be enforced. *R. R. Co.* v. *Lockwood,* 17 Wall., 357 (84 U. S. xxi., 627); *Bank of Kentucky* v. *Exp. Co.,* 93 U. S., 174 (xxiii., 872); *Marshall* v. *Baltimore & Ohio R. R. Co.,* 16 How., 314; *Meguire* v. *Corwine,* 101 U. S., 108 (xxv., 899)."

The Circuit Court of Appeals for the Ninth Circuit, in an appeal from the Circuit Court of the United States for the District of Oregon, in the case of *Couper* v. *Shirley,* 75 Fed. 168, had occasion to pass upon the same question when the mortgage in suit contained a stipulation that, upon institution of foreclosure proceedings, a receiver of the rents and profits might be appointed on application of the mortgagee. The court first points out that the receiver was appointed solely in pursuance of the stipulation contained in the mortgage, and not by virtue of any of the established general principles of equity, which, when alleged to exist, would authorize a court of equity to appoint a receiver. The provision of the statute, the same quoted in the case of *Teal* v. *Walker, supra,* is then set out, and a quotation made from the opinion of the Supreme Court of the United States in that case. The court then says:

"This decision is conclusive of the only question involved in this case. It may be that in states where there is no statute changing, or in any manner abrogating, any of the common-law rules upon this subject, authorities might be found to have the effect that the parties to a real-estate mortgage would have the right to make any contract which they mutually agreed upon. But it would serve no useful purpose to discuss that question. It is enough to say that it has been authoritatively settled that, under the provisions of the statutes of Oregon, they have no power to bind the courts, independent of any equitable condition which might to shown to exist, by any stipulation, contract, covenant, or agreement contained in the

mortgage for the appointment of a trustee or receiver to take charge of the rents, issues, and profits of the mortgaged premises pending a foreclosure of the mortgage. This must be true, for under such a statute the mortgage does not convey any title to the mortgagee, but is a security merely for the debt; and the mortgagee, before foreclosure, has no legal interest in the lands mortgaged to him, and is not entitled to the possession thereof."

The court then reviews the Michigan holding to which we have already referred, and concludes with a statement that the receiver at first appointed was properly discharged.

From the state of Washington come several decisions that also bear out the holding in the cases above referred to. In the case of *Dennis* v. *Moses,* 18 Wash. 537, the court was called upon to determine, among other questions, the validity of a provision in a mortgage by which the mortgagor waived the right of possession during the period of redemption as given him by law. As to this feature, the court said:

"It may have been but an attempt in this instance to evade the law relating to possession during the redemption period, not at all necessary for the protection of the mortgagee nor a substantial part of the contract. If so, the mortgagor could not waive the right in the instrument creating the debt, or before default generally, when the situation becomes fixed and he is directly confronted with its effects. There was no showing in this case that the land was inadequate security for the debt. After default the law would permit a waiver. A debtor might waive his exemptions by failing to claim the same after levy. This law declares a public policy and establishes a salutary rule. While it operates for the benefit of debtors, it also benefits the public by benefiting a large number of citizens. It is in the same class as those laws preventing waivers in insurance policies relating to agents and otherwise, which are well known, and also declaring after what performance life insurance policies shall be non-forfeitable regardless of stipulations. The law permits a mortgage of a homestead, and it might be a matter of public policy that the owner should not be turned out of possession immediately upon foreclosure. He might surrender possession after default and sale, but not be allowed to stipulate therefor in the instrument creating the debt."

While the foregoing decision does not touch upon the question of the appointment of a receiver *pendente lite,* yet it indicates the attitude of the court as to stipulations in an executory contract waiving rights guaranteed to citizens in conformity with a public policy of the state.

In *Norfor* v. *Busby,* 19 Wash. 450, which was a mortgage foreclosure, an application was made by the plaintiff for the appointment of a receiver *pendente lite.* In holding that such appointment was properly refused, the court pointed out the change of the common law rule as to mortgages by the enactment of the law denying to the mortgagee the right of possession until foreclosure and sale according to law, and declared that the statute in question was expressive of the public policy of the state vesting the right of possession in the mortgagor absolutely until a decree and sale. Cases from other jurisdictions are then reviewed, and the court concludes:

"When the mortgage is executed, the valuation of the security is made by the respective parties to the contract, and it is also executed in view of the public policy of the state expressed by the statute, and it is evident that the statute cannot be evaded by taking the most valuable incidents of possession from the mortgagor under the guise of rents and profits."

In the case of *Balfour-Guthrie Inv. Co.* v. *Geiger,* 20 Wash. 579, the question was again presented. A receiver was at first appointed by the trial court, but discharged before the entry of the final decree. In approving such discharge, the Supreme Court said:

"We think the case is controlled by *Norfor* v. *Busby,* 19 Wash. 450 (53 Pac. 715). That case was ably presented and received mature consideration from this court, and the able argument of appellant's counsel has failed to convince us that it should be overruled."

It is not our purpose to show under what circumstances equity will permit the appointment of a receiver upon recognized equitable grounds; to do so here would extend this article beyond reasonable bounds. We have sought merely to show that the courts will not permit a public policy of a state to be evaded or overridden by stipulation in a mortgage requiring the mortgagor to forego something that the law has expressly guaranteed to him. We are satisfied that the foregoing authorities amply show the law in that respect.

W. F. Meier.

AN ACT RELATING TO AND REGULATING MARRIAGE AND MARRIAGE LICENSES; AND TO PROMOTE UNIFORMITY BETWEEN THE STATES IN REFERENCE THERETO.

Prepared by the commissioners on uniform state laws and completed in 1912 *and recommended to the various states for adoption.* J. R. Thornton, I. D. Wall, W. O. Hart, Commissioners for Louisiana.

Section I. Be it enacted by the General Assembly of the State of Louisiana, That marriage may be validly contracted in this State only after a license has been issued therefor, in the manner following:

1. Before any person authorized by the laws of this State to celebrate marriages (and hereinafter designated as the officiating person), by declaring in the presence of at least two competent witnesses other than such officiating person, that they take each other as husband and wife; or,

2. In accordance with the customs, rules and regulations of any Religious Society, Denomination or Sect to which either of the parties may belong, by declaring in the presence of at least two competent witnesses that they take each other as husband and wife.

Section II. No person shall be joined in marriage within this State until a license shall have been obtained for that purpose from the local Board of Health, City Court or Justice of the Peace of the Parish in which one of the parties resides; provided, that if both parties be non-residents of the State such license may be obtained from any one of the said officers of the Parish where the marriage ceremony is to be performed.

Section III. Application for a marriage license must be made at least five days before the license shall be issued; provided, that in cases of emergency, or extraordinary circumstances

the Judge of the District Court of the Parish may authorize the license to be issued at any time before the expiration of said five days.

Section IV. No license shall be issued unless both of the contracting parties shall be identified to the satisfaction of the officer issuing the license, who shall further require of the parties, either separately or together, a statement under oath relative to the legality of the contemplated marriage, the date of same, the names, relationship, if any, age, nationality, color, residence and occupation of the parties, the names of the parents, or tutors of such as are under the age of legal majority; any prior marriage or marriages of the parties, or either of them, and the manner of the dissolution thereof; and if there be no legal objection thereto, such officer shall issue a Marriage License in the form hereinafter prescribed. Or, the parties intending marriage may, either separately or together appear before any Judge or Justice of the Peace of the Parish or County (whether in this or any other State) wherein either of the contracting parties resides, or of the place where the marriage is to be performed, who shall require of them a statement under oath as above provided; and such statement, having been duly subscribed and sworn to, and the parties having been duly identified, shall be forwarded to the proper officer, who, if satisfied after an examination thereof, that the same is in proper legal form, and that no legal objection to the contemplated marriage exists, shall issue a license therefor.

Section V. No license shall be issued if either of the contracting parties be under the marriageable age of consent as established by law. If either of the contracting parties be between the marriageable age of consent as established by law, and the age of legal majority, no license shall be issued without the consent of his or her parents, or tutor, or of the parent having the actual care, custody and control of such minor or minors, given before the officer under oath or certified under the hand of such parents or tutor aforesaid, and properly verified by affidavit before a Notary Public or other official authorized by law to take affidavits, which certificate shall be filed of record in the office of said officer and entered by him on the Marriage License Docket before issuing said license; Provided, that if there be no tutor of either or both of such minors, or if there be no competent person having the actual care, custody and control of such minor or minors, then the Judge of the district of the residence of the minor may, after hearing, upon proper cause shown, make an order allowing the marriage of such minor or minors.

Section VI. Immediately upon entering an application for a license, the officer shall post in his office a notice giving the names and residences of the parties applying therefor, and the date of the application. Any person believing that the statements of the application are false or insufficient, or that the applicants or either of them are incompetent to marry, may file with the District Court in the Parish in which the license is applied for, a petition under oath, setting forth the grounds of objection to the marriage, and asking for a rule upon the parties making such application to show cause why the license should not be refused. Whereupon, said Court if satisfied that the grounds of objection are *prima facie* valid, shall issue a rule to show cause as aforesaid, returnable as the Court may direct, but not more than ten days from and after the date of said rule, which rule shall be served forthwith upon the applicants for such license, and upon the officer to whom such application shall have been made, and shall operate as a stay upon the issuance of the license until further ordered. If, upon hearing, the objections be sustained, the Court shall make an order refusing the license; the costs to rest in the discretion of the Court; but if the objections be overruled, the party or parties filing the same shall be liable for all costs of the proceedings.

Section VII. Any person who shall, in any affidavit or statement required or provided for by the Sections IV, V, or VI of this Act, wilfully and falsely swear, or who shall procure another to swear falsely in regard to any material fact relating to the competency of either or both of the parties applying for a Marriage License, or as to the ages of such parties, if minors, or who shall falsely pretend to be the parent or tutor, having authority to give consent to the marriage of such minors, shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine of not less than $100.00 or more than $500.00, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Section VIII. Any officer who shall knowingly issue a Marriage License contrary to, or in violation of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine of not less than $100.00 or more than $500.00, or imprisonment for not more than one year, or both such fine and imprisonment.

Section IX. Model forms for blank applications, statements, consent of parents, affidavits, licenses, and marriage certificates and such other forms as shall be necessary to comply with the provisions of this Act shall be prescribed by the State Board of Health and provided at the expense of the State; and a sample copy of each of said forms shall be furnished to the Local Boards of Health, Clerks of the District Courts and City Courts, and Justices of the Peace of each Parish of the State. The State Board of Health shall furnish, at the cost of the State, to the said officers all of the aforesaid blanks, together with a suitable book to be called the Marriage License Docket, which said officers shall keep in their offices among their records, and enter therein a complete record of the applications for, and the issuing of all Marriage Licenses, and of all matters which they are required by this Act to ascertain relative to the rights of any person to obtain a license. Said Marriage License Docket shall be open for public inspection or examination at all times during office hours.

Section X. The license shall authorize the marriage ceremony to be performed in any Parish of this State excepting that where both parties are non-residents of the State, the ceremony shall be performed only in the Parish in which the license is issued. The license shall be directed "to any person authorized by the law of this state to solemnize marriage," and shall authorize him to solemnize marriage between the parties therein named, at any time not more than one year from and after the date thereof. If the marriage is to be solemnized by the parties without the presence of an officiating person, as provided by paragraph Two of Section One of this Act, the license shall be directed to the parties to the marriage. If either of the parties be not of the age of legal majority, then his or her age shall be stated and the fact of the consent of his or her parents, tutor, or Judge of the District Court, shall likewise be stated; and if either of said parties shall have been theretofore married then the number of times he or she shall have been previously married, and the manner in which the prior marriage or marriages was or were dissolved, shall be stated. The officiating person shall satisfy himself that the parties presenting themselves to be married by him are the parties named in the license; and if he knows of any legal impediments to such marriage, he shall refuse to perform the ceremony. The issuance of a license shall not be deemed to remove or dispense with any legal disability, impediment or

prohibition rendering marriage between the parties illegal, and the license shall contain a statement to that effect.

Section XI. Said license shall be in form substantially as follows:

No. .....)
State of .....)
Parish of .....)

No.....

To any person authorized by the laws of this State to solemnize marriage:

You are hereby authorized at any time not more than one year from and after the date hereof, within the.....of..... (not knowing any legal impediment thereto) to join in marriage in accordance with the laws of this State A.....B..... aged..... and never heretofore married, (or married on the.....day of....., A.D....., to E..... F....., said E..... F..... having died on the .....day of....., A.D.....; or, said A.....B .....having been divorced from said E..... F..... or said marriage annulled by the Court of..... of the.....of.....State of.....on the.....day of .....A.D.....), and C.....D.....aged..... and never heretofore married, (or married on the.....day of .....A. D....., to G.....H....., said G .....H.....having died on the.....day of..... A. D.....; or said C.....D.....having been divorced from said G.....H.....or said marriage annulled by the Court of..... of the.....of..... ....State of.....on the.....day of.....A. D..... .....). The consent of.....the.....of the said A..... B..... and of....., the.....of the said C..... D..... having been duly given. The issue of this license shall not be deemed to remove or dispense with any legal disability, impediment or prohibition rendering marriage between the parties illegal.

Given under my hand and the seal of the..... of..... State of..... at....., this..... day of..... Anno Domini one thousand nine hundred and.....

(Seal) .....

Section XII. If the marriage is to be solemnized by the parties without an officiating person, as provided by Paragraph 2 of Section 1 of this Act, the license shall be in form substantially as follows:

State of.....)
Parish of.....)
No. .....)

No.....

To A..... B..... aged....., and C..... D....., aged.....

This is to certify that, legal evidence having been furnished to me as required by law, and the consent of..... the..... of the said A..... B..... and of..... the .....of the said C..... D..... having been duly given, I am satisfied there is no legal impediment to joining yourselves in marriage in accordance with the customs, rules and regulations of any Religious Society, Denomination or Sect to which you, or either of you, may belong, at any time not more than one year from and after the date hereof, within the..... of.....

The issue of this license shall not be deemed to remove or dispense with any legal disability, impediment or prohibition rendering marriage between you illegal.

Given under my hand and the seal of the.....of..... State of.....at.....at this.....day of..... Anno Domini one thousand nine hundred and.....

(Seal)

Section XIII. The license shall have appended to it three certificates, numbered to correspond with the license, (one marked "original," one marked "duplicate," and one marked "triplicate") which shall be in form substantially as follows:

MARRIAGE CERTIFICATE.

I, ..., hereby certify that on the ..... day of ..... Anno Domini one thousand nine hundred and..... at..... in the ..... of ..... State of ..... A..... B..... of..... State of..... and C..... .... D..... of ..... State of....., were by me united in marriage as authorized by a Marriage License issued for that purpose by the ..... of ..... and State of ..... numbered ..... and dated the ..... day of A. D. 19....

Signed.....
(Official Signature).....

We, the undersigned, were present at the marriage of A..... .... B..... and C..... D....., as set forth in the foregoing certificate, at their request, and heard their declarations that they took each other for husband and wife.

D.....E.....
F.....G.....

But if, as provided by Section XII of this Act, the license has been issued to the parties themselves, then the certificate (in triplicate) shall be in form substantially as follows:

MARRIAGE CERTIFICATE.

We hereby certify that on the ..... day of ..... Anno Domini one thousand nine hundred and ..... we united ourselves in marriage in accordance with the customs, rules and regulations of the..... at..... in the..... of..... and State of ..... having first obtained from the..... of the..... of..... State of..... a Marriage License numbered..... and dated the..... day of..... A. D. 19...., certifying that he was satisfied that there was no legal impediment to our so doing.

A.....B.....
C.....D.....

We, the undersigned, were present at the marriage of A.... ..... B..... and C..... D....., as set forth in the foregoing certificate, at their request and heard their declarations that they took each other as husband and wife.

B.....E.....
F.....G.....

And the duplicate certificate in each case shall contain the following words: "N. B. This duplicate certificate must be returned to the official who issued the license within thirty days from the date of the marriage."

Section XIV. The Marriage Certificates marked "original" and "duplicate," duly signed, shall be given by the officiating person to the persons married by him; and the certificate marked "triplicate" shall be returned by such officiating person, or, in the case of a marriage ceremony performed without an officiating person, then by the parties to the marriage contract, or either of them to the Parish Board of Health within thirty days after the date of said marriage.

Section XV. The officers receiving such duplicate certificate, shall immediately enter the same on the Docket where the Marriage

License of said parties is recorded, and place such certificate on file.

Section XVI. If any officiating person shall solemnize a marriage unless the contracting parties shall first have obtained a proper license as hereinbefore provided; or unless the parties to such marriage declare that they take each other as husband and wife; or without the presence of two competent witnesses; or, in the case of a minor or minors, unless the consent, as hereinbefore provided, of the parent, or tutor of such minor or minors be stated in such license or by the authority of the District Judge; or shall solemnize a marriage knowing of any legal impediment thereto; or shall solemnize a marriage more than one year from and after the date of the license; or shall falsely certify to the date of the marriage solemnized by him; or shall solemnize a marriage in a parish other than the one prescribed in Section X of this act, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $100.00 or more than $500.00, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Section XVII. Where a marriage is solemnized without the presence of an officiating person, then, and in that case, if the parties to such marriage shall solemnize the same more than one year from and after the date of the license; or shall falsely certify to the date of such marriage; or shall solemnize the same in a parish other than the one prescribed in Section X of this act, they and each of them shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $100.00 or more than $500.00 or by imprisonment for not more than one year, or by both such fine and imprisonment.

Section XVIII. If any person, not being duly authorized by the laws of this State, shall wilfully or knowingly undertake to solemnize a marriage in this State, he shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than $100.00, or more than $1000.00, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Section XIX. Every officiating person, or persons, marrying without the presence of an officiating person, as provided by paragraph 2 of Section 1 of this Act, who shall neglect or refuse to transmit the triplicate certificate of any marriage solemnized by him or them, to the Parish Board of Health within thirty days after the date of such marriage, shall be fined the sum of one hundred dollars.

Section XX. Any officer who shall refuse or neglect to enter upon the marriage license docket a complete record of each application, and of each marriage license issued from his office, immediately after the same shall have been made or issued, as the case may be, or to enter the duplicate certificate of any marriage upon the marriage license docket, as required by Section XV of this act, or shall fail to keep such marriage license docket open for inspection or examination by the public during office hours, or shall prohibit or prevent any person from making a copy or abstract of the entries in the marriage license docket, shall for each such illegal act, omission or denial, be fined the sum of fifty dollars.

Section XXI. Any fine or forfeiture accruing under the provisions of this act may be recovered by an action of debt, in the same manner as other debts are recovered by law, with the usual costs, in the proper Court of any Parish in the State in which the defendant or defendants may be found.

Section XXII. A copy of the record of the marriage license, and marriage certificate, certified under the hand of the proper officer shall be received in all Courts of this State as *prima facie* evidence of such marriage between the parties therein named.

Section XXIII. All marriages hereinafter contracted in violation of any of the requirements of Section 1 of this act shall be null and void (except as provided in Sections XXIV and XXV of this act); provided that the parties to any such void marriage may, at any time, validate such marriage by complying with the requirements of this act, and the issue thereof, if any, shall thereupon become legitimate as provided in Section XXVII of this act.

Section XXIV. No marriage hereafter contracted shall be void by reason of want of authority or jurisdiction in the officiating person solemnizing such marriage if the marriage is in other respects lawful and is consummated with the full belief on the part of the persons so married or either of them that they have been lawfully joined in marriage.

Section XXV. No marriage hereafter contracted shall be void either by reason of the license having been issued without the consent of the parents or tutor of a minor, or by a person not having jurisdiction to issue the same, or by reason of any omission, informality or irregularity of form in the application for the license or in the license itself, or by reason of the incompetency of the witnesses to such marriage, or because the marriage may have been solemnized in a manner other than the one prescribed in Section X of this act, or more than one year after the date of the license, if the marriage is in other respects lawful and is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage. Where a marriage has been celebrated in one of the forms provided for in Section 1 of this act, and the parties thereto have immediately thereafter assumed the habit and repute of husband and wife, and have continued the same uninterruptedly thereafter for the period of one year, or until the death of either of them, it shall be deemed that a license has been issued as required by this act.

Section XXVI. If a person during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract in accordance with the provisions of Section 1 of this act, and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, or that the former marriage had been annulled or dissolved by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death, or divorce of the other party to such former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents.

Section XXVII. In any and every case where the father and mother of an illegitimate child or children shall lawfully intermarry, such child or children shall thereby become legitimated, and enjoy all the rights and privileges of legitimacy as if they had been born during the wedlock of their parents; and this section shall be taken to apply to all cases prior to its date, as well as those subsequent thereto; provided, that no estate already vested shall be divested by this act.

Section XXVIII. The officers above named of each Parish shall, on or before the first day of February in each year, make return to the Board of Health of this State, upon suitable blank forms to be provided by the State, of a statement of all

marriage licenses issued by him during the preceding calendar year, including all the facts required to be ascertained by them upon the issuing of each license; and shall also make return of a statement of all marriage certificates which shall have been returned to them during such period; and upon neglect or refusal to do so, such officers shall forfeit and pay the sum of one hundred dollars for the use of the parish.

Section XXIX. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those States which enact it.

Section XXX. This act shall take effect the first day of January, Anno Domini 1915.

LIABILITY OF RESTAURANT KEEPER FOR SERVING UNWHOLESOME FOOD.*

The Supreme Court of Connecticut in a recent case (***Merrill*** v. *Hodson*, 91, Atl. Rep. 533, had before it the interesting question of the right to recover damages for ptomaine poisoning caused by unwholesome food furnished by a restaurant keeper to a customer. The conclusion reached by the court was that there is no implied warranty of quality attending the furnishing of food under such circumstances, and the plaintiff was not entitled to recover. Since the decision has been subjected to some criticism, we reproduce the important parts of the opinion of Chief Justice Prentice, who spoke for a unanimous court:

"A restaurant keeper differs from an innkeeper in that he furnishes only food, or food and drink, and not lodging or shelter. Beale on Innkeepers, §§ 35, 301. In so far as the character of the service performed by a restaurant keeper and innkeeper to their respective patrons is concerned it is the same. In *Saunderson* v. *Rowles*, 4 Burrows, 2067, 2068, Lord Mansfield, commenting upon this fact, observed that 'the analogy between the two cases of an innkeeper and a victualler is so strong that it cannot be got over.' In neither case does the transaction, in so far as it involves the supply of food or drink to customers, partake of the character of a sale of goods. The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires, or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion which is carved for his use, or of that which finds a place upon his plate or in side dishes set about it. No designated portion becomes his. He is privileged to eat and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants; but there he must stop. He may not turn over unconsumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need or desire—ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass: after consumption there remains nothing to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service, and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food supplied as a factor in the service rendered.

"Prof. Beale in his work on Innkeepers, § 169, well analyzes and states the situation as follows: 'As an innkeeper does not lease his rooms, so he does not sell the food he supplies to the guest. It is his duty to supply such food as the guest needs, and the corresponding right of the guest is to consume the food he needs, and to take no more. Having finished his meal he has no right to take food from the table, even the uneaten portion of food supplied him; nor can he claim a certain portion of food as his own to be handed over to another in case he chooses not to consume it himself. The title to food never passes as a result of an ordinary transaction of supplying food to a guest.'

"For the reasons thus stated the English courts have held that an innkeeper was not a trader, and so not within the provisions of existing bankrupt laws. In *Crisp* v. *Pratt*, Cro. Car. 549, it was said in connection with such a ruling that 'an innkeeper does not get his living by buying and selling; for although he buy provisions to be spent in his house, he doth not properly sell it, but utters it at such rates as he thinks reasonable gain, and the guests do not take it at a certain price but they may have it or refuse it at will.'

"In *Saunderson* v. *Rowle, supra*, Lord Mansfield, having observed as already indicated that a victualler and innkeeper stood in the same position in the matter of buying and selling, added, 'and we are all clear that this man (a victualler) is not within these laws upon the authority of a determined case of an innkeeper, and also upon the reason of the thing. He makes no particular contract like a trader: he cannot be said to get his living by buying and selling as a trader does. He buys only to spend in his house; and when he utters it again it is attended with many circumstances additional to the mere selling price.'

"In *Parker* v. *Flint*, 12 Mod. 254, it was said that 'an innkeeper as such could not be a bankrupt because he does not sell, but utters his provision.' Other cases to the effect that an innkeeper is not a trader are *Newton* v. *Trigg*, 3 Mod, 327, 330; *Harman* v. *Clarkson*, 22 Up. Can. C. P. 291.

"The transaction between the plaintiff and the defendant did not involve a sale of goods, and the provisions of the fifteenth section of the Sales' Act, relied upon as creating an implied warranty of quality, furnish no foundation for a right of action.

"The situation was no different at common law. Our Sale of Goods Act has not either in its definition of a sale, or its provisions for implied warranty of quality, departed from the common law in any respect pertinent to this case. This becomes clear from a comparison of the common law rule and those furnished by the act.

"Benjamin in his work on Sales defines a common law sale of personal property as 'a transfer of the absolute or general property in a thing for a price in money.' In the leading case of *Jones* v. *Just*, (1868) L. R. 3 Q. B. 197, 202, Mellor, J., stated at length the common law rules touching the subject of implied condition or warranties. The fourth he stated as follows: 'Where a manufacturer or dealer contracts to supply an article which he manufactures or produces or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such case the buyer trusts to the manufacturer or dealer and relies upon his judgment and not upon his own.'

"It is difficult to discover in what particular of present importance a substantial change in the law has been wrought by our recent legislation.

"This is not surprising since our act in its pertinent provisions does not differ substantially from the English act either in its definition of a sale, or in respect to the subject of implied warranty of quality, and the English act was, as its author has said, the result of an endeavor to reproduce as exactly as possible the existing law. Chalmers' Sale of Goods, Introduction viii. While there is in our act some departure from the phraseology of the English touching these subjects, the changes in substance are slight, and they all concern matters irrelevant to the present situation. In fact the similarity in expression is such as to forcibly suggest that § 15 of our act, which deals with the subject of implied warranty of quality, was, with slight changes here immaterial, taken directly from its English predecessor.

"This being the case, we may safely look for light in resolving the question before us to common law cases as well as to any

*As to liability for negligence of proprietor of restaurant or lunchroom to person injured by eating therein, see note, Ann. Cas. 1914 B, page 885.

which may have arisen under the modern sales legislation. As far as we are aware no case of the latter sort, save the present, has ever reached an appellate tribunal. Of common law cases we find the following four: *Sheffer* v. *Willoughby,* 163 Ill, 518; *Crocker* v. *Baltimore Lunch Co.,* 214 Mass. 177; *Pantanze* v. *West,* 61 So. 42; *Doyle* v. *Fuerst & Kraemer,* 129 La. 838. In all of them the right of action was based upon negligence. We know of no case, aside from the present, in which an attempt has ever been made in cases brought to recover for the harmful consequences resulting from unwholesome food or drink supplied by the keeper of an inn, restaurant, or boarding house in the line of his business to recover upon the strength of an implied condition or warranty of quality. Those which have grown out of a sale of provisions by a dealer are, of course, not in point. In the first of the cited cases the obligations of a restaurant keeper are discussed, and a statement of the law made which very plainly means, and has been generally understood to mean, that the only remedy for the consequences of eating unwholesome food supplied by an innkeeper or restaurant keeper in the regular course of his business is one for lack of due care. Beale on Innkeepers, §§ 169, 302, so states the law. See to the same effect 22 Cyc. 1081; 16 Amer. & Eng. Ency. of Law, 547.

"In *Bigelow* v. *Maine Central R. Co.,* 110 Me. 105, action was brought against the defendant for the consequences to the plaintiff of his having eaten unwholesome canned asparagus served to him in the defendant's dining car. The declaration was in case, and its allegation was that the defendant was negligent. Notwithstanding this statement of the pleadings the plaintiff contended that she was under no duty to show either privity of contract or negligence, since there was an implied warranty of wholesomeness, and the defendant was an insurer of the quality of the asparagus. The court held that in any event the defendant could not be held to be an insurer of the quality of canned goods or a warrantor of it, and for that cause directed judgment for the defendant. This case, followed by *Trafton* v. *Davis,* 110 Me. 318, presents an aspect of the subject of implied warranty under common law principles which does not concern us, and in its disposition no light is shed upon the views of the court as to whether there would have been an implied warranty had the food served not been canned goods.

"Reasons of appeal for other causes than that discussed call for no consideration, since the plaintiff must fail in his action.

"There is error, the judgment is set aside, and a new trial ordered. In this opinion the other judges concurred."

Cases of Interest.

Title to Oysters Found on Tidelands.—In State *v.* Johnson, (Wash.) 141 Pac. 1040, it was held that oysters, in common with other shellfish, found on the tidelands belonging to the state, are so far wild by nature that any one finding them may, in the absence of a statute prohibiting the act, take them and convert them to his own use, without violating any of the general criminal statutes of the state.

Act of Attorney in Changing Decree after Signing by Chancellor as Contempt.—In the case of *In re* P., (N. J.) 91 Atl. 326, it appeared that a solicitor in chancery represented defendants in a suit before one of the Vice-Chancellors, in which they filed a cross-bill having for its object the cancellation of the mortgage described in the bill of complaint. The matter being decided in favor of the defendants represented by P., he presented to the Vice-Chancellor a form of decree adjudging that the mortgage "be delivered up for cancellation, and the clerk of the county of . . . is hereby directed to cancel said mortgage of record." P. presented the draft of decree in person, and the Vice-Chancellor struck out the concluding words "and the clerk of the county of . . . is hereby directed to cancel said mortgage of record," for the reason that the county clerk was not a party to the suit, and that therefore no decree could be made against him. P. withdrew, taking the decree with him for filing in the clerk's office, and afterwards interlined it in his own handwriting, after the word "cancellation," which was the concluding word of the decree as amended by the Vice-Chancellor, the words "and that the same be cancelled of record," so as to make the decree read that the mortgage "be delivered up for cancellation, and that the same be cancelled of record," instead of simply that it "be delivered up for cancellation," as it was made to read by the Vice-Chancellor when he signed the advisory certificate at the foot thereof. The decree was subsequently signed by the Chancellor, without knowledge of the solicitor's action. It was held that this conduct of P. amounted to contempt of court.

Assault on One's House as Assault on Person with Reference to Self Defense.—The case of State *v.* Perkins, (Conn.) 91 Atl. 265, lays down the rule that an assault on one's house can be regarded as an assault on the person, within the meaning of the law with reference to self-defense, where the purpose of the assault is an injury to the person of the occupant or members of his family, to accomplish which the assailant attacks the house in order to reach the inmate. The court said: "In such case the inmate need not flee from his house in order to escape injury by the assailant, but he may meet him at the threshold and prevent him from breaking in by any means rendered necessary by exigency, and upon the same ground and reason that one may defend himself from peril of life or great bodily harm by means fatal to the assailant, if rendered necessary by the exigency of the assault." In overruling exceptions to the instructions of the trial judge the court further said: "In effect the jury was instructed that if one is attacked unlawfully in his own dwelling house by one who is attempting to make a forcible and unlawful entry therein, he is not obliged to retreat, but he may use such means as are absolutely necessary to prevent the assailant's forcible entry, even to taking life. It is justifiable homicide if it appears that the resistance is neither greater in degree nor earlier in time than is necessary, and it results in the death of the assailant, unless the householder under such circumstances should take the opportunity of the unlawful entry to kill the intruder to gratify his hatred, malice, or ill will, when the killing will be at least manslaughter. While these instructions are not in accord with the law of those jurisdictions where the right to take life in the defense of one's dwelling is limited to occasions where it is reasonably apparent that the intruder is actuated by a felonious purpose, they well state what we regard as the better and sounder rule."

Gasoline Tanks Adjoining Premises of Another as Private Nuisance.—Large gasoline tanks adjoining the premises of the complainant were declared to be a private nuisance in Whittemore *v.* Baxter Laundry Co., (Mich.) 148 N. W. 436, and under the circumstances there shown an injunction was granted enjoining the storing of gasoline in such tanks. The court said: "We may grant that the storage of gasoline on premises adjacent to or adjoining the premises of another is not a private nuisance *per se.* It might, however, become such, considering the locality, the quantity, and the surrounding circumstances, and would not necessarily depend upon the degree of care used in its storage. . . . We may also concede that in the instant case every precaution that human ingenuity has conceived has been made use of in the construction of the tanks as testified to by defendant's experts. Considering, however, the dangerous character of the substance and its power as an explosive, of which in this age of its wonderful development as a power to propel automobiles, traction engines, and airships, we can well take judicial notice, and also considering human fallibility, that accidents in

the operation of the most perfect mechanism will occur, and all that it needs to change what is, when properly protected, a harmless agency to a most dangerous explosive is a careless person, can it be said that to have 20,000 gallons of such an agency stored within but a few feet of one's dwelling house is not sufficient to be an unreasonable interference with the comfortable enjoyment of that home? This is a purely residence district of the city, and was such before the defendant began operating its dry-cleaning business, and it must be apparent to any fair minded person that the location of these tanks in such immediate proximity to complainant Whittemore's house would necessarily damage his property."

Power of Municipality to Compel Persons Displaying Advertising Cards in Street Cars to Pay License Tax.—In Pacific Rys. Advertising Co. *v.* Conrad, (Cal.) 141 Pac. 916, plaintiff sought an injunction restraining the respondent from interfering with advertising cards which it was displaying in the railway cars operated by the Southern Pacific Company in Alameda. The interference of the chief of police was based upon the refusal of the plaintiff to pay the sum exacted by the license ordinance of the city of Alameda. The vital question upon the trial and upon the appeal was whether that ordinance was so unjust, oppressive, and discriminatory as to be illegal and void. Judgment passed for defendant upon general demurrer sustained to plaintiff's complaint, and plaintiff appealed, resulting in an affirmance of the judgment. Henshaw, J., writing the opinion of the court said: "The ordinance is clearly a revenue measure within the power of the municipality to pass. The limitations upon the exercise of this power are familiar ones, that a legitimate business such as this shall not be subjected to oppressive or unjustly discriminatory burdens. Within that limit there is full play for municipal discretion. . . . It is only when such an ordinance is clearly unjustly oppressive and discriminatory that the power of a court may be invoked to right the wrong. Manifestly there is, and must be, a broad zone dividing and delimiting, upon the one hand, those ordinances which are clearly responsible and just from those which are as clearly unreasonable and unjust. In all that broad zone legislative discretion operates. It is doubtful territory. Ordinances falling within it cannot be set aside by the courts, for then there is a clear substitution of the judgment of the courts for the judgment of the legislature and thus plain judicial legislation. It would add nothing to this consideration to analyze and discuss the many cases presented for consideration by opposing counsel. The result of the consideration, however, may be declared in this: That the ordinance in question falls within the indicated zone where the view of a court may not be substituted for the determination of the legislature."

Validity of Contract for Advertising Space on Curtain of Theatre Used for Sunday Shows.—In Minnesota, conducting a picture and vaudeville show on Sunday, where it is so conducted as not seriously to interrupt the repose and religious liberty of the community, is not in violation of any statute of the state, and it is held that a contract for advertising space on the curtain of a theater so conducted, the contract contemplating its use on Sunday, is not void. The decision will be found in Houck *v.* Ingles, (Minn.) 148 N. W. 100, wherein the court said: "This action was brought by the plaintiff, the owner of the advertising privileges on the curtains in two theaters in St. Paul, to recover for advertising space furnished the defendants under a written contract. At the close of the testimony, the case was dismissed on the motion of the defendants. The plaintiff appeals from the order denying his motion for a new trial. The two theaters conducted picture show and vaudeville entertainments daily, including Sundays. The advertising contract between the plaintiff and the defendants contemplated that the space on the curtains would be used daily, including Sundays. The defendants claim that the theaters were conducted on Sunday in violation of law, and that therefore the plaintiff cannot recover. They rely upon R. L. 1905, § 4981 et seq., as amended by Laws 1909, c. 267, all now embraced in G. S. 1913, § § 8752-8754. That statute, so far as it prohibits public shows on Sunday, was construed in State *v.* Chamberlain, 112 Minn. 52, 127 N. W. 444, 30 L. R. A. (N. S.) 335, 21 Ann. Cas. 679, not to prohibit a picture show when the same was conducted in such a way as not seriously to interfere with the repose and religious liberty of the community. That was made the test. There is no substantial reason for distinguishing between that case and this; and, applying and following it, we hold that a contract for advertising space on the curtain of a theater so conducted, though the contract contemplated its use on Sunday, is not illegal. It is not claimed that the theaters were so conducted as to offend the statute, as it was construed in State *v.* Chamberlain, supra."

Degree of Care of Telephone Company in Seeing that Patrons Have Proper Telephone Service.—The Alabama Supreme Court has, through McClellan, J., in the recent case of Vinson *v.* Southern Bell Telephone & Telegraph Co., 66 So. 100, admirably stated the duty which a telephone company owes its patrons in the following language: "It is the duty of telephone companies maintaining lines and exchanges for the purpose of affording patrons the means of telephonic communications to exercise in that public service a character and degree of care and diligence and skill commensurate with their undertaking. All reasonable and proper means and agencies within their control should be employed to secure effective, prompt, and accurate service. The duty exacted comprehends reasonable and proper care, skill, and effort to afford for the service undertaken suitable appliances, instruments, and apparatus, and competent and skilled servants, agents, and operators. And if the appliances, instruments, or apparatus are defective, or if the operatives are incompetent or unskilled, or if there is other negligence in respect of the service undertaken, liability attaches for the loss or damage proximately resulting therefrom to one entitled to proper, prompt, and efficient service. Such companies are not insurers; and where the service undertaken is interfered with, or rendered ineffectual, by uncontrollable causes—causes not traceable or ascribable to negligence or intentional misconduct in respect of the duty assumed—such companies are not liable for a tortious breach of duty. . . . Where a telephone company installs an instrument through which it undertakes, for a consideration, to afford continuous telephone service, or service during definite parts of the day or night, or service upon application therefor through public stations, and persons authorized to avail of the service pursue the usual method to effect the use of the telephonic system so tendered by the company, and the telephone service so undertaken to be afforded is not given, or is unsufficiently or ineffectually afforded, the presumption *prima facie* is that negligence of the company or of its servants or employes, is the cause of the failure of the telephone service, or of its inefficiency; and the obligation to rebut the *prima facie* presumption thereupon passes to the telephone company; which presumption may be rebutted by proof that the cause was of an uncontrollable nature or was unavoidable by the exercise of due care, skill, and diligence, or was the result of acts for which the company was not responsible, either directly or in consequence of its negligent omission to employ due care and skill and diligence to discover the effect of such acts and to remove or repair after becoming aware thereof."

Liability of Owner of Sign Suspended Above Sidewalk for Fall of Same Causing Injury to Passer-by.—In Hass *v.* Booth, 148 N. W. 337, which was an action for damages for injuries sustained by the plaintiff as the result of the fall of a sign above the sidewalk along which he was walking, the declaration charged the defendant with negligence in the construction of the sign in question, negligence in the maintenance of the sign, and negligence in failure to properly inspect. The court directed a verdict for the defendant, holding that, he having engaged a competent and reputable contractor for the purpose of erecting the sign, he was therefore absolved from liability based upon a negligent erection. It was held on appeal that the instruction of the trial court was erroneous for reasons stated by the court as follows: "It may be stated at the outset that the authorities as to the liability of one for injury, occasioned to a pedestrian lawfully upon the street, by the falling of a sign or awning maintained by the owner or occupier of a building, and suspended over the sidewalk, are not harmonious. In most jurisdictions it is held that the doctrine of *res ipsa loquitur* applies, but that the defendant may avoid recovery by affirmative proof showing that he had exercised ordinary care. . . . This court has never had occasion to determine exactly what degree of care would absolve from liability one who maintains a sign or awning over a public street for his own purpose in case said sign or awning fell upon a foot passenger lawfully occupying the sidewalk thereunder. It has frequently been held that any encroachment upon a street, either on or above the surface, of a permanent nature, which endangers or interferes with its use, is a public nuisance. . . . The English courts come very nearly to holding that the duty to maintain such a structure in safety is an absolute one. . . . In this case plaintiff does not contend that defendant must maintain such a structure at his peril. He urges, however, that one who maintains, suspended over the sidewalk of a crowded city for his own purpose, a sign or other structure, which if permitted to fall is liable to kill or injure those lawfully using the sidewalk beneath it, should be charged with a very high degree of care. It is unnecessary, therefore, in the instant case to say more than that the plaintiff's contention as to defendant's duty is warranted by the law. This duty is not lessened by reason of the fact that the offending party may have secured the right to maintain said sign from the legislative authority of the municipality, nor by the further fact that the municipality itself, through a failure to cause the removal of such sign or structure as a nuisance, might itself be liable under the authorities last cited. . . . The question of defendant's negligence under proper instructions as to his duty in the premises should have been submitted to the jury."

Crimes Punishable by Death or Confinement in Penitentiary as Misdemeanors.—In Dutton *v.* State, (Md.) 91 Atl. 417, which was an appeal from a judgment of conviction of assault with intent to commit rape, an objection made by the appellant that he was not arraigned was held to be without merit, as in Maryland the crime for which the appellant was convicted was but a misdemeanor although it could be punished by death or imprisonment in the penitentiary. The court said: "The distinction made in some jurisdictions that crimes punishable by death or confinement in the penitentiary are felonies and others misdemeanors has never existed in this state, but here only those are felonies which were such at common law, or have been so declared by statute. The fact that a crime is punishable in the penitentiary or is 'infamous' does not make it a felony in this state. It was said in State *v.* Bixler, 62 Md. 360: 'The general court of this state in Clarke's Lessee *v.* Hall, 2 Har. & McH. 378, defined "infamous crime" to be one which rises at least to " the grade of felony." This is however too narrow, for perjury is a misdemeanor, but by all authority is "infamous."' On the same page it is also said: 'There are many misdemeanors punishable by confinement in the penitentiary, which clearly are not "infamous crimes" within the meaning of the common law or of the Constitution. If, for example, the prisoner has been convicted of any of the assaults with intent, mentioned and punished by the Code, and had been sentenced to the penitentiary and served his time out there, without being pardoned by the Governor he would not be chargeable with having committed an "infamous crime."' In Garitee *v.* Bond, 102 Mo. 379, 62 Atl. 631, 111 Am. St. Rep. 385, 5 Ann. Cas. 915, Judge Schmucker, in delivering the opinion of the court, referred to the case of Ex parte Wilson, 114 U. S. 422, 5 Sup. Ct. 938, 29 U. S. (L. ed.) 89, where the Supreme Court held that the provision in the United States Constitution which prohibits prosecution for 'a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury' must be considered not merely from the standpoint of the character of the crime, but also from the nature of the consequences to the accused, if he should be found guilty, and went on to say: 'But even in Wilson's Case it was held that at common law prior to the Declaration of Independence "it was already established law that the infamy which disqualified a convict to be a witness depended upon the character of his crime and not upon the nature of his punishment."' Again it was there said: 'The authorities generally, though not with entire uniformity, hold that the infamous nature of a crime was determined at common law by the character of the act itself, and not by the penalty inflicted for its commission,' and after referring at length to State v. Bixler, supra, it was distinctly held that the crime considered in Garitee *v.* Bond could not be regarded as infamous merely because it was punishable at the discretion of the court in the penitentiary. So whatever may be the law elsewhere, it is clear that an assault with an intent to commit a rape is not a felony, and is not even an "infamous crime" as that term is understood in this state.'"

News of the Profession.

Made County Judge in Illinois.—James T. Burns of Kankakee has been appointed county judge of Kankakee county, Illinois.

Appointed Superior Judge.—Hal C. Thurman has been appointed by Governor Cruce of Oklahoma as superior judge of Muskogee county.

The Conference of the International Law Association (Association de Droit International), fixed to take place at The Hague on September 7, has been postponed indefinitely.

The Missouri Bar Association met in annual session at St. Louis, Mo., on September 22, 23 and 24. The next number of Law Notes will contain further particulars.

Named Special Judge in Georgia.—C. M. Efird of the Lexington bar has been appointed special judge of the Sixth Judicial District of Georgia to succeed the late Judge Ernest Gary.

The North Dakota State Bar Association held its annual meeting at Grand Forks, N. Dak., on September 17 and 18. Further particulars will be noted in the next issue of Law Notes.

New United States Attorney-General.—Thomas Watt Gregory of Texas has been appointed, by President Wilson, Attorney-General of the United States to succeed James C. McReynolds, elevated to the Supreme bench.

Appointed Judge of Municipal Police Court.—Mayor Kiel has appointed his son-in-law, Granville Hogan, to fill the unexpired term of Karl Kimmel as judge of the Municipal Police Court of St. Louis, Mo.

Correction.—The name of the newly elected president of the Ohio State Bar Association was incorrectly given in the last issue of Law Notes. The correct name and address is John N. Van Deman, Dayton, Ohio.

Appointed to Appellate Bench.—William H. Spence of Lisbon has been appointed by Governor Cox judge of the court of appeals for the seventh judicial district of Ohio. Judge Spence succeeds the late Myron H. Norris.

The Washington State Bar Association, at its recent annual convention, elected the following officers: President—Frank Reeves, Wenatchee; secretary—C. Will Shafer, Olympia; treasurer—Arthur Remington, Olympia.

New Justice of the Supreme Court.—The vacancy on the bench of the United States Supreme Court caused by the death of Mr. Justice Lurton has been filled by the appointment of Attorney-General James C. McReynolds as a member of the court.

Appointment by Interstate Commerce Commission.—Frank A. Gamble, of Jasper, Ala., has been appointed by the interstate commerce commission chief of the legal department of the Southern branch of the service, with headquarters in Chattanooga, Tenn.

Remains in Paris.—Charles F. Beach, the well-known American lawyer with offices at 95 Rue des Petits-Champs, Paris, has announced his intention of remaining in that city during the war. A number of other American lawyers, it is said, have pulled up stakes and departed.

Officers of Negro Bar Association.—The National Negro Bar Association, in recent convention at Muskogee, Okla., elected the following officers: President—Perry W. Howard, of Mississippi; secretary—William Harrison, of Oklahoma; treasurer—Charles Brookes, of Pennsylvania.

The Utah State Bar Association held its sixteenth annual meeting at the Hermitage in Ogden canyon on August 15. In addition to the address of the president, Herbert R. MacMillan, the program included an address by Hon. E. S. Farrington, United States judge for the district of Nevada.

New Probate Judges.—William M. Erickson of Red Wing has been appointed judge of probate of Goodhue county, Minn., to fill the vacancy caused by the death of Judge Alex. Haller. Governor Eberhart has also appointed Dr. Carlton Graves of Aitkin probate judge of Aitkin county to succeed Judge George Williams, deceased.

Missouri Commission Named.—Governor Major of Missouri has appointed Robert Lamar of Houston, John F. Morton of Richmond, and A. L. Alford of Perry, as members of a commission to examine the statutes of Missouri and to report to the legislature the incongruous, unconstitutional and conflicting laws which the legislature will be asked to repeal.

Changes Among United States Attorneys.—Earl M. Donalson of Bainbridge, Ga., has been appointed United States attorney for the Southern District of Georgia.—Arthur L. Oliver of Caruthersville, Mo., has succeeded Charles A. Houts as United States attorney for the Eastern District of Missouri.—L. E. Stone of Clinton, Ill., has been appointed first assistant United States attorney for the Southern District of Illinois, succeeding Henry A. Converse, resigned.—Charles F. Clyne of Aurora, Ill., has been appointed United States attorney for the Northern District of Illinois, to succeed James H. Wilkerson, resigned.

Law School Changes.—Professor George F. Wells has resigned from the faculty of the law school of the University of West Virginia to accept the deanship of the law school of the University of North Dakota.—Jay P. Taggart of Ashland, O., has been appointed dean of the law school of the Ohio Northern University at Ada. Mr. Taggart succeeds Dean S. P. Axline, resigned.—Lyman P. Wilson, professor of law in the University of Idaho, has been appointed professor of law in the University of Oklahoma.—James E. Morrisette of Tuscaloosa, Fla., has been chosen as a member of the law faculty of the University of Alabama.—Warren Madden of Freeport, Ill., has been appointed professor of law at the University of Oklahoma.

Montana State Bar Association.—The annual convention of the Montana State Bar Association was held at Billings, Mont., on August 13, 14 and 15. President Jesse B. Roote of Butte delivered the annual address. The program as announced included the following speakers: Hon. Sydney Sanner; Judge J. M. Clements; O. F. Goddard, "Disqualification of Judges"; Hon. W. C. Bristol, Portland, Ore., "The Misuse and Abuse of the Law"; Hon. John T. Smith, "Eugenics as They Are"; Hon. T. J. Walsh, "The Seventeenth Amendment"; Hon. J. Bruce Kremer, "The Proposed Workman's Compensation Act"; Hon. Theodore Brantly, "The Law's Delays and the Causes of them"; Hon. W. L. Holloway, "The Reorganization of the Judiciary, a Needed Reform"; Hon. George M. Bourquin, "Legal Education"; Hon. Henry C. Smith, "Judges"; E. B. Howell, "The Primary Election Method of Choosing Party Candidates"; Hon. W. T. Pigott, "Who Loses?"; Hon. R. Lee Word, "Amendment of Rules"; Harry H. Parsons, "Public Policy"; Harry L. Wilson, "Legal Lyrics"; James A. Walsh, "Procedure."

Minnesota State Bar Association.—The annual convention of the Minnesota State Bar Association was held at St. Paul, Minn., on August 20, 21 and 22. The President's address, on "Simplification of Pleading and Practice," was delivered by Hugh V. Mercer, of Indianapolis. Other addresses were as follows: "Uniform Judicial Procedure," by Thomas W. Shelton, of Norfolk, Va.; "Appellate Procedure," by Justice George L. Bunn, of the Minnesota Supreme Court: "Method of Selecting and Retiring Judges," by Albert M. Kales, of Chicago; "The Hay-Pauncefote Treaty," by Charles B. Elliott, of Minneapolis; "Organization of Courts," by Roscoe M. Pound, of Harvard University. A paper on "Initiative and Referendum" was read in the absence of the author, James A. Tawney, former Congressman and chairman of the International Joint Boundary Commission. The following officers were elected: President—Harrison L. Schmitt, Mankato; vice-president—Stiles W. Burr, St. Paul; secretary—Chester L. Caldwell, St. Paul; treasurer— Royal A. Stone, St. Paul; board of Governors—Albert Shaller, Hastings; N. H. Clapp, St. Paul; Edward Lees, Winona; George W. Buffington, Minneapolis; H. E. Leach, Owatonna; Benjamin Taylor, Mankato; A. H. Vernon, Little Falls; W. C. Odell, Chaska; George P. Olson, St. Peter; J. N. Hopp, Sleepy Eye, Jens Jenswold, Jr., Duluth; C. A. Fosness, Montevideo; E. H.

Canfield, Luverne; E. O. Hagen, Moorhead; E. E. McDonald, Bemidji; L. E. Jones; A. L. Allen, Fairmount; W. H. Cutting, Buffalo; Edwin V. Buffington, Stillwater.

New Mexico Bar Association.—The annual meeting of the New Mexico Bar Association was held at Albuquerque, N. Mex., on August 18 and 19. The official program included the address of President Francis C. Wilson on "Tax Legislation," a symposium on "Eminent Jurists," by Federal Judge W. H. Pope, United States Senator T. B. Catron, and Hon. Frank W. Parker, justice of the supreme court, and the reading of the following papers: "Needed Changes in Appellate Procedure," by Hon. Clarence J. Roberts, chief justice of the supreme court; "Requirements for Admission to the Bar," Hon. W. J. Lucas, chairman of the state board of bar examiners; "Child Labor," by Hon. James M. Hervey, former attorney-general of the territory; "Remedial Legislation," by Hon. Frank W. Clancy, attorney-general of the state; "Legal Ethics," by Hon. Summers Burkhart, United States attorney for New Mexico; "Collection of Delinquent Taxes," by Hon. C. W. G. Ward, district attorney for the Fourth judicial district. Officers were elected as follows: President—M. E. Hickey, Albuquerque; vice-president for First District—Francis C. Wilson, Santa Fe; vice-president for Second District—J. A. Miller, Albuquerque; vice-president for Third District—J. H. Paxton, Las Cruces; vice-president for Fourth District—W. J. Lucas, Las Vegas; vice-president for Fifth District—Tomlinson Fort, Roswell; vice-president for Sixth District—F. W. Velacott, Silver City; vice-president for Seventh District—E. A. Tittman, Hillsboro; vice-president for Eighth District—J. D. Cutlip, Tucumcari; secretary-treasurer—Mrs. Nellie C. Pierce.

Deaths.—The following recent deaths of prominent members of the profession have been noted: August 11, at New York City, General Thomas M. Logan, aged 73, lawyer and Civil War veteran; August 13, at Red Wing, Minn., Axel Haller, aged 56, for twenty years judge of probate of Goodhue county, Minn.; August 14, at Duluth, Minn., George Thomas Williams, aged 65, probate judge at Aitkin, Minn.; August 16, at Houstonia, Mo., John P. Higgins, former member of the County Court from the Western District of Missouri; August 22, at Versailles, Mo., William T. Bowen, aged 66, presiding judge of the County Court of Morgan county, Mo.; August 22, at Waukon, Ia., Marion Bradley Hendrick, aged 77, former probate judge of Allamakee county, Ia.; August 22, at Huntsville, Ala., David D. Shelby, aged 67, judge of the United States Circuit Court of Appeals, Fifth Circuit; August 25, at Athens, O., Rufus Carpenter, aged 79, former probate judge of Delaware county, O.; August 26, at Seattle, Wash., David G. Lapham, formerly surrogate of Ontario county, N. Y.; August 27, at Alamosa, Colo., Charles C. Holbrook, aged 71, judge of the Twelfth District Court of Colorado; September 2, at Memphis, Tenn., J. B. Eckels, aged 48, judge of the Circuit Court of Mississippi, Seventeenth District.

"It would be impossible to administer the law if ignorance of its provisions were a defense thereto. There are cases, undoubtedly, where ignorance of the law, united with fraudulent conduct on the part of others, or mistakes of fact relating thereto, will be regarded as a defense, but there must be some element, other than a mere mistake of law, which will afford an excuse. In addition there ought to be no negligence in attempting to discover the facts." Peckham, J. Utermehle v. Norment, 197 U. S. 55.

English Notes.

Aerial Warfare.—The development of aerial navigation, which will, no doubt, profoundly affect the conditions of modern warfare and has already proved an important factor in the present war, may well direct attention to the conditions of aerial warfare. The whole question of balloon attacks was fully discussed in 1899, when a declaration was adopted at the first Hague Peace Conference, on July 29, 1899, prohibiting for a term of five years the launching of projectiles or explosives from balloons or other kinds of aerial vessels. The second Peace Conference on October 18, 1907, renewed this declaration, but only for a period extending to the termination of the third Peace Conference. It was ratified by Great Britain, but Germany, France, Italy, Russia, Spain, and Japan have all refused to sign it and it is obviously of little, if any, value. The Institute of International Law, at its meetings at Madrid in 1911, adopted the principle that aerial warfare must not comprise greater danger to the person and property of the peaceful population than land or sea warfare. "There can be no doubt," writes Professor Oppenheim, "that the general principles laid down in the Declaration of St. Petersburg of 1868 in the two declarations adopted at the first Peace Conference concerning expanding bullets and projectiles diffusing asphyxiating or deleterious gases in the air, rules concerning land warfare, and the like, must find application as regards violence directed from air vessels."

Prize Courts.—An announcement in the *Times* by the Prize Court that an action has been instituted in that court by the Procurator-General against the owners of the "Schlesien," of Bremen, seized and taken as a prize by H.M.S. "Vindictive," and for the vessel's "condemnation," is editorially referred to as an advertisement of a character which has not been published for generations, the last Prize Court having been held in 1854, during the Crimean War. Lord Stowell (known, perhaps, better as Sir William Scott), the elder brother of Lord Chancellor Eldon, who became in 1791 judge of the Court of Admiralty, the most eminent civilian of his generation, has thus described the function of the Prize Court, over which he presided with éclat, in administering the generally accepted law of nations when set up by a belligerent state for the purpose of deciding on the validity of captures made by their cruisers. Lord Stowell declared it to be his duty "to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral, some belligerent. The seat of judicial authority is, indeed, locally here in the belligerent country according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine the question exactly as he would determine the same question if sitting at Stockholm, to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden as a neutral country which he would not admit to belong to Great Britain in the same character." (The "Maria," Robinson's Admiralty Reports, vol. 1, p. 340.)

Who Is a Spy?—In a letter quoted by the London *Standard* from a French private to his father, the writer says: "We reconnoitered the enemy's position, dressed as civilians, in a dogcart. We played the spy, but what of that? It is for France." In these words we have an admirable definition of the spy as distinguished from the reconnoiterer in uniform,

which is legitimate. A spy is one who with disguise or other deception goes peaceably among the enemy forces to discover and report their condition. The Hague Conference (Convention, arts. 29-30) declared that "an individual can only be considered a spy if, acting clandestinely or on false pretences, he obtains or seeks to obtain information within the zone of operations of a belligerent with the intention of communicating it to the hostile party. Although captured spies are, as a general rule, liable to be hanged regardless of the fact that they are authorized by their commanders, the Hague Convention requires a trial before punishment, even when they are taken in the act. Wellington employed spies constantly in Spain, and Wolseley frankly advocates them. Information about the enemy from some source is necessary, and reconnoitering in uniform which is permitted reveals only external conditions. The criminality of the spy is limited to the special expedition. After the spy has rejoined his army he ceases to be such, and, if subsequently captured, is to be treated as other prisoners of war. Messengers by balloons—and the same principle is, of course, applicable to all air vessels—have been recognized at the Hague Conference (second Hague Convention, art. 29) as a legitimate means of reconnaissance. Persons so traveling are to be regarded, when captured as prisoners of war, as legitimate aids to military operations.

BALANCE OF POWER.—The European crisis has directed attention to the doctrine of the balance of power. It has been urged that an equilibrium between the members of the family of nations is an indispensable condition to the very existence of international law. If the nations could not keep one another in check, all law of nations would soon disappear, as naturally an over-powerful state would tend to act according to discretion instead of according to law. Since the Westphalian Peace of 1648 the principle of the balance of power has played a preponderating part in the history of Europe. It found express recognition in 1713 in the Treaty of Peace of Utrecht; it was the cardinal principle of the Vienna Congress in 1815; of the Congress of Paris in 1856, of the Congress of London in 1867, and the Congress of Berlin in 1878. The states themselves and the majority of writers agree on the admissibility of intervention in the interests of the balance of power. Mr. F. E. Smith, K.C., M.P., writes in a somewhat disparaging tone of the doctrine of the balance of power in respect to intervention. "The theory of the balance of power has in the past frequently supplied an excuse, but seldom, if ever, a justification, for intervention. At the beginning of the eighteenth century the prospect of a union between France and Spain was the cause of much fighting, and Napoleon III. relied upon the theory in his attempts, partly successful and partly unsuccessful, to increase the territory of France, but little has been heard of it in late years. The idea of preserving 'an international equilibrium of forces' must always exercise a certain influence upon diplomacy, but the world, except in certain phases of popular discussion, has apparently abandoned the notion that a state may justly be attacked and punished for becoming too strong."

NECESSITY OF DECLARATION OF WAR.—The formal declaration of war signed by the Minister of Foreign Affairs of the Austro-Hungarian Government on July 28, and its official notification of the Servian Government and to the foreign representatives in Vienna are in accordance with the provisions of the Convention (III.) of the Second Peace Conference at The Hague in 1907 relative to the commencement of hostilities, which was signed by all the Powers represented at the conference, except China and Nicaragua, both of which subsequently became signatories. According to art. 1 of Convention III., hostilities must not commence without a previous and unequivocal warning, and one of the forms which this warning may take is a declaration of war stating the reasons, as on the declaration of the Austro-Hungarian Government, why the Power concerned has recourse to arms. According to the former practice of the states, a condition of war could *de facto* arise either through a declaration of war, or through a proclamation and manifesto of a state that it considered itself at war with another state, or through the committal by one state of certain acts of force against another state. History presents many instances of war, commenced in one of these three ways. Many writers, following the example of Grotius, have always asserted the existence of a rule that a declaration of war is necessary for the commencement of war, but it cannot be denied that until the second Peace Conference of 1907 such a rule was neither sanctioned by custom nor by a general treaty of the Powers. Article 2 of Convention III. enacts that the belligerents must at once after the outbreak of war notify the neutrals, even if only by telegraph, and that the state of war shall not take effect with regard to neutrals until after they have received notification, unless it be established beyond doubt that they were in fact aware of the condition of war.

LIFE POLICY EFFECTED AND PREMIUMS PAID BY BANKRUPT.—In the recent case of Re Phillips; Ex parte Official Receiver (110 T. L. Rep. 939), the question was whether the circumstance that, without the knowledge of the trustee in bankruptcy, a policy of life insurance was effected by a bankrupt on his own life and the first premium was paid by him thereon while he was still an undischarged bankrupt rendered the case distinguishable from that of Tapster *v.* Ward (101 L. T. Rep. 503). For in that case the policy was effected and the first premium, and one only, was paid before the bankruptcy, without the existence of the policy being disclosed to the trustee in bankruptcy. It was decided by the Court of Appeals, affirming the decision of Mr. Justice Eve, that the trustee having been absolutely ignorant of the existence of the policy, and the payments for premiums in respect thereof having been made by the debtor himself without the knowledge of the trustee, the official receiver was entitled to the policy moneys on the death of the bankrupt, as against the legal personal representative of the deceased. Mr. Justice Horridge, before whom Re Phillips (ubi sup.) came on to be heard, did not see why the difference in the period in which the policy was effected by the bankrupt and the first premium was paid—or a further difference that the dispute arose there between the creditors in two bankruptcies, whereas in Tapster v. Ward (ubi sup.) it arose between the creditors in the bankruptcy and the personal representative of the deceased bankrupt—ought to lead him to a different conclusion. The learned judge distinguished Re Tyler; Ex parte Official Receiver (97 L. T. Rep. 30; (1907) 1 K. B. 865) as the Court of Appeal had done in Tapster *v.* Ward (ubi sup.). And his Lordship did so for the same reason —that is to say, the knowledge of the trustee in bankruptcy of the existence of the policy and the necessity for paying the premiums: (see also Re Hall; Ex parte Official Receiver, 97 L. T. Rep. 33; (1907) 1 K. B. 875). When it is borne in mind that it is settled beyond all controversy that a person who keeps up a policy which is not his own property cannot claim any lien in the nature of salvage on the proceeds thereof (see Re Leslie; Leslie *v.* French, 48 L. T. Rep. 564; 23 Ch. Div. 552; and Falcke *v.* Scottish Imperial Insurance Company, 56 L. T. Rep. 220; 34 Ch. Div. 234), the principle of the present decision becomes abundantly clear.

Common-Law Lien for Maintenance of Motor Car.—In addition to persons who are under an obligation to receive the goods of others—such as carriers and innkeepers—those who have employed their labor and skill in the alteration and improvement of chattels delivered to them with that object have a particular lien on the same at common law for their charges. Scores of cases are cited in the text-books to establish that proposition. And the one that, perhaps, may most advantageously be referred to is that of Bevan *v.* Waters (Moo. & Mal. 236, 3 Car. & p. 520). There Lord Chief Justice Best very clearly enunciated the principle, applying it to a livery-stable keeper for the keep and exercise of a horse sent to him for the purpose of being trained. So both an artificer to whom goods are delivered for the purpose of being worked up into form and a farrier by whose skill an animal is cured of a disease have liens on their respective chattels for their charges (per Baron Parke in Scarfe *v.* Morgan, 4 M. &. W. 270, at p. 283). But the principle does not extend to cases where expenses have been incurred in respect to an object without effecting any alteration or improvement therein. The right which a person has to retain possession of a thing until his claim on the owner thereof is satisfied does not then exist. What, therefore, Mr. Justice Sargeant had to determine in the recent case of Hatton *v.* Car Maintenance Co., Ltd. (110 L. T. Rep. 765) was whether an agreement that the defendants should for three years "well and sufficiently maintain" the plaintiff's motor car, supply all petrol, lubricant, tires, tubes, and other things necessary for the proper running of the car, repair breakdowns, provide a competent driver, and keep the car in good repair and fit for use, conferred on the defendants a lien at common law for moneys due to them under the agreement. Did the well-settled principle above mentioned apply to the case, or did it not? The decision of the Divisional Court, consisting of Lord Alverstone, C. J., and Justices Kennedy and Ridley, in Keene *v.* Thomas (92 L. T. Rep. 19; (1905) 1 K. B. 136) was relied on to support the contention that where the owner of a car sends it to be repaired, the repairer has a lien on it for the costs of the repairs that he has executed. Mr. Justice Sargent did not dissent at all, his Lordship remarked, from that view of the law if, of course, the repairer got the article into his possession for the purpose of repair, and by that repair improved it as he would ordinarily do. All turned on that single element. The learned judge, however, had necessarily to state that there was nothing in the authorities to show that, if what the contractor did was not to improve the article but merely to maintain it in its former condition, he got a lien for the amount spent on it for that maintenance. Maintenance minus improvement avails the contractor in no wise when the question of setting up a lien on a car comes into operation. Although there is no point of particular novelty in the decision in the present case, yet it is of some importance because it very effectively demonstrates the law on a subject that is of widespread interest in these days of private motor cars left at garages. And if the learned judge has not arrived at a true conclusion on the point above dealt with, at any rate he was plainly right on the second point: The existence of a lien is inconsistent with an arrangement under which the article sought to be retained is, from time to time, taken entirely out of the possession and control of the bailee—as in the case of a motor car must invariably happen.—*Law Times* (London).

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Obiter Dicta.

Body Snatching.—Steele *v.* Graves, 68 Ala. 17.

Decided in the Affirmative.—Yess *v.* Yess, 255 Ill. 414.

Since Love Was Dead.—Love *v.* Love, 32 L. J., Mat. 134, was an action for an absolute divorce.

Moot Courts.—"The courts do not sit for the mere purpose of pouring judicial oil upon injured feelings or enabling a party to say to his antagonist, 'I told you so.'"—Per Weaver, J., in Dugane *v.* Smith, 140 Iowa 678.

The Court Must Have Tried It.—"All the evidence tends to show that they were trying to get the hog out of the field, and probably shot it out of that anger which the exercise of running a hog out of a field usually generates."—See Fulmore *v.* State, 8 Ga. App. 703.

Lucky Georgia.—"In this State, notwithstanding his reduced importance as a domestic factor, the husband is still the head of his family."—Declared in Broome *v.* Davis, 87 Ga. 587 (decided in 1891), and reiterated in Smith *v.* Berman, 8 Ga. App. 270 (decided in 1910).

The Naked Truth.—"They came out unscathed from under a hot fire of the searching cross-examination, conducted by artful and learned lawyers with a few inconsequential discrepancies upon irrelevant and immaterial matters—just enough to demonstrate that the evidence had not been manufactured; and their evidence, taken as a whole, was symmetrical and forceful, and stands forth in the record, clear and distinct, like, silhouetted against the sky, the human figure of an undressed gladiator, perfect in all of its parts."—See Billingsley *v.* Illinois Central R. Co., 100 Miss. 626.

Criminological Inferences.—The advantages of a penitentiary education and the inferiority of woman to man are inferences clearly to be drawn from the following remarks of the court in Cowan *v.* Beall, 1 MacArthur (D. C.) 274: "These three exhibits presented by Mrs. Cowan are either true, or they involve a series of complications and forgeries that would do credit to the hand of a masculine adept who has had the benefit of two or three convictions and the experience of some years' service in the penitentiary. For it would require the discipline of a penitentiary education to prepare a man for the commission of such cunningly-devised forgeries as are charged upon this woman."

As Related By the Irishman.—Of the following yarn, it is sufficient to say that it was sent to us by one of our Irish correspondents:—Three lawyers, an Englishman, a Scotchman and an Irishman, were sitting around a table of good cheer.

The Englishman said to Jamie, "If ye were not a Scotchman, what would ye rather be?" Jamie, to be conciliatory, said: "If I were not a Scotchman, I think I would be an Englishman." He then asked John if he were not an Englishman, what would he be, and John replied: "I think I would be a Scotchman." Turning to the Irishman, they asked: "If you were not an Irishman, what would you be?" He replied promptly: "If I were not an Irishman, I would be ——— ashamed of meself."

Almost Persuaded.—"Messrs. Carty and Vertrees, the solicitors of the telephone company, have made most able and instructive arguments, showing that comprehension of the merits and magnitude of the controversy, so characteristic of the diligent and zealous lawyer; and the principal difficulty I have had in reaching a conclusion has been the intellectual fascination wrought upon me by their argumentation. I admire, honor and love genius, learning, diligence and zeal, and confess that they cast upon me in this case a spell to which I would have bowed had not duty sternly commanded me to do as I have done." Per Gibson, Ch. in East Tenn. Tel. Co. *v.* Knoxville St. R. Co., 3 Am. Elec. Cas. 407.

Letting Mary Do It.—Forrester *v.* State, 63 Ga. 349, was a criminal prosecution for retailing liquor without a license. Justice Bleckley's story of how the retailing was carried on, and his interesting comments thereon, follow: "In the defendant's kitchen, by his servant, in his presence, and with his co-operation through the responses, 'Go to Mary,' and 'Give the money to Mary,' the traffic was carried on. There is little doubt that the defendant was the deity of this rude shrine, and that Mary was only the ministering priestess. But if she was the divinity and he her attending spirit to warn thirsty devotees where to drink, and at whose feet to lay their tribute, he is amenable to the state as the promoter of forbidden libations. Whether in these usurped rights he was serving Mary or Mary him, may make a difference with the gods and goddesses, but makes none with men."

A Suggestion Not Likely to Be Followed.—In Ex p. Burris, 133 Pac. 1139, an application for a writ of habeas corpus on behalf of a man confined in jail pending his trial on a charge of adultery, Judge Furman of the Oklahoma Criminal Court of Appeals suggests that the petitioner take a philosophical view of the situation. Says the learned judge: "Petitioner in the letter above set out complains bitterly that as the result of his confinement he is losing in flesh and that his clothes are becoming entirely too large for him. If he will take a philosophical view of the situation he can console himself with the reflection that this may not be an unmixed evil, for as his blood becomes thinner and cooler it may have the effect of moderating the ardor of his affections for another man's wife and of assisting him in subduing his passions and keeping them within due bounds, which all good citizens should do."

Extracts from Lamm's Essays.—"Shall a court that is (and has been invited to be) about the serious business of settling a grave question of jurisdiction, turn aside to emit a mere squeak on costs as the be-all and end-all of the matter? We do not sit in the comedy of Much Ado About Nothing, if we know it in advance." State ex rel. Thomas, 249 Mo. 109.

"On the theory of the rhyming adage, A *little*—to-wit, a very little—*nonsense now and then*, etc., I recall the facetious and rather sly definition of 'mind' and 'matter' laid at the door of a celebrated metaphysician, viz.: What is mind? *No matter.* What is matter? *Never mind.* It serves to somewhat earmark the elusiveness and obscurity inherent in the subject." Lorenzen *v.* United Rys. Co., 249 Mo. 189.

"What is a proximate cause is often one of the most subtle and profound questions that ever vexed philosophers. I remember it was told of no less men than Pericles and Protagoras that they argued for a whole day on whether the dart, or the thrower of the dart, or those who arranged the game, was the cause of the death of a participant in the Olympian Games. The better view is that where permissible on the facts, as it is in this case, to the jury is left the issue of fact of proximate cause." Simpson *v.* Iron Works Co., 249 Mo. 407.

"We pause to notice that counsel for appellant assume to refer to one of Mr. Donaldson's counsel as a 'prestidigitator,' etc. In taking that course counsel overlook the red danger signal in the *dictum* of Gary, J., in that behalf, viz: Ill nature and vituperation in a brief excite suspicion that its maker is on the wrong side of the case. [Touhy *v.* Daly, 27 Ill. App. c. 460.] That *dictum* is not without standing ground in reason; for is not the cynical advice of General T. to an inquiring young brother often followed (more's the pity), viz.: 'When the law and the facts are both against you, there are only two courses left open —yell like an Indian, or abuse the attorney on the other side.' But enough of that. (*Verbum sat sapientii.*)" Donaldson *v.* Donaldson, 249 Mo. 247.

"We held in the former case, in effect, that the city could not take such precedent steps until there was official action, a legislative step, evidencing a municipal plan, intent and ability *in praesenti* to build the viaduct. Otherwise (*benefits* lying at the root of the power invoked against the property-owner) the benefits assessed would be conjectural and speculative—i. e., the property-owner damaged could well say: You offset my actual damages with the moonshine of imaginary benefits from an imaginary viaduct. You take a ducat from my pocket and pay me back in chips and whetstones, thereby despoiling me in the name of the law, doing like the unjust man I remember to have read of, viz.:

> 'With one hand he put
> A penny in the urn of poverty,
> And with the other took a shilling out.' (Kansas City *v.* Woerishoeffer, 249 Mo. 29.)

"But is not that view of it more ingenious than sound? If either is prohibited are not both prohibited? The good sense of the thing lies in the answer *yes*. To illustrate in a homely fashion: If a father prohibit either of his two boys from riding a horse, Bucephalus, under the pains and penalties of punishment, would the youths expect to be acquit of disobedience if they rode Bucephalus double? If a mother prohibit to either of her two daughters the reading of Don Juan, would it be allowable for them to construe the interdiction so that they might read it in concert? We opine the construction put on the words of the deed by appellants is too narrow, in that it quite ignores the large question, the master fact, viz., the pious use to which the land was devoted. Such strained and unnatural construction smacks of wringing the words so hard the meaning extracted is bitter, even as the wringing of the nose brings blood." Mott *v.* Morris, 249, Mo. 147.

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Law Notes

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Periodical Examination of Lawyers.

IT is rarely that a session of a state legislature ends without some absurd measure having been proposed for enactment. At the last session of the Massachusetts legislature a bill was introduced and voted upon in the House to require lawyers to take an examination every ten years in order to retain membership in the bar. The bill was, of course, defeated, and served only as another illustration of the queer effects that frequently result from that itch for legislating which appears to be endemic in legislative assemblies. It is no disrespect to the legal profession to say that many of its members would not earn a "cum laude" at a bar examination. After ten, twenty, or thirty years' practice of the law, with more or less specialization upon some branch of it, the theory and terminology of the science become somewhat obscure. A lawyer might not be able offhand to define a negative pregnant or to state the rule in Shelley's case, yet be competent nevertheless to draw a demurrer-proof pleading or to draft a will that should carry out fully the intentions of the testator. The law is after all so much of a business that proficiency and efficiency therein come more from the actual practice of it than from the study of its principles as a science. A bar examination might therefore be a fair test of academic knowledge of the law without being determinative of a lawyer's ability and skill as a practitioner. It is possible to give too much thought to books and reading. Much knowledge comes from other sources. It was Herbert Spencer, we think, who once said about a certain erudite contemporary: "If I read as much as he does I should know as little."

Government Censorship over Marconi Stations.

THE Marconi Wireless Company has brought an injunction suit to enjoin the officers of the Navy Department from censoring or closing its stations. The injunction was applied for when the Navy Department placed censors in several of the Marconi stations and closed a number of others, as a result of President Wilson's desire to preserve a strict neutrality in connection with the European war. The issue raised by the suit is whether Congress or the President of the United States has the power to make neutrality laws governing new conditions created by the war. The Attorney-General's opinion, upon which President Wilson appears to have acted in the premises, is that at an extraordinary time such as this, in the absence of laws by Congress or international rules governing neutrality, the President has the power to make such laws, rules, or regulations as in his judgment are required. On the other hand the contention of the attorneys for the Marconi company is that Congress is the sole judge as to what laws or regulations shall be established to preserve our status as a neutral nation. The situation is an unusual one, and naturally enough there are no direct precedents to meet it. A liberal interpretation of certain constitutional provisions would probably warrant lodging the power in question either in Congress or in the Executive. The Marconi suit will be an interesting one in view of the opportunity that will be afforded for a discussion as to the respective powers of the Legislative and Executive Departments of the government under the constitution. It seems to be conceded that this is a judicial question. If in the present suit the decision goes against the government the President will doubtless submit gracefully to a rescission of the order made against the Marconi company. He will hardly assume the belligerent attitude that Andrew Jackson once did when President, with reference to a coercive order made by Chief Justice Marshall. "Marshall has made his order," said Jackson truculently, "now let him enforce it."

Profitable Recreation for Young Lawyers.

THE report comes from a town in Kansas that at the last harvest when the wheat crops of the neighboring farmers became imperiled through lack of harvest hands the lawyers along with the merchants and other business men in the town donned their old clothes and went out to the farmers' assistance. This was a neighborly and commendable act, and moreover on the part of the lawyers established a precedent that the younger members of the profession could follow every year with much profit to themselves, irrespective of any urgent need among the farmers. Young lawyers are not usually pressed with business, especially during the summer months. They might well close their offices and fare forth to the harvest fields for a few weeks. They would thus get a good outing and make a little money into the bargain. If they were solicitous to preserve the proprieties they could tack a slip on their office doors: "Out of town on business." They would thus be going the English barrister Byles one better and leave less ground for the impugnment of their veracity. Tradition has it that Mr. Byles in the days of his legal novitiate frequently closed his office and went horseback riding. He had dubbed his horse "Business,"

and made his recreation serve the ends of professional advertising by putting on his office door, when leaving, a card bearing the unimpeachable inscription: "Out on business."

Court as School for Brides and Benedicts.

As a result of the precedent set by a young couple in Chicago the Court of Domestic Relations of that city, instead of being a school for scandal, is likely to become a school of education for prospective brides and bridegrooms. It appears that a young man and his fiancée spent four days in that tribunal listening to the sordid tales of domestic unhappiness told by those brought before the court. "We wanted to see," the young man said, "just what difficulties we might have to face, and we have gathered an inestimable fund of information from this great school of experience. We now understand the pitfalls by the wayside better, know just where they are and shall try to steer clear of them." The action of these young people is of course highly commendable, but we venture to say that the spirit which animated them in thus seeking light for their marital pathway will prove a surer guarantee of a happy domesticity than the knowledge of the shoals and shallows that caused the matrimonial shipwreck of others. It is not always a difference over the big things in married life that makes a failure of marriage. It is more often the cumulative effect of disagreements over little things—things which, by reason of an obdurate incompatibility of temper in the parties, are wrested from their true proportion and given an exaggerated value. A case comes to mind of a couple who had their first quarrel over the question as to whether matches should be placed in the match-safe heads down or up. That ill-mated pair might easily have come to swords' points over the matter in issue between the two warring sects in Swift's "Lilliput"—the Big-endians and the Little-endians—who were divided over the stupendous question as to whether egg-shells should be broken at the big or the little end.

Free Legal Aid.

A new departure has been made in the law courts of England by which free legal service is provided for poor litigants. Access to the English courts has hitherto been practically denied to poor people, owing to the high scale of legal fees. A department of the courts has now been established where poor people can go directly without consulting a lawyer and present their grievances. If these are decided to be real and well founded from a legal point of view the government will undertake to carry their cases through and the expense will be paid from the public funds. Solicitors and barristers who are willing to take up these matters will enroll their names with the department, and cases will be allotted to them in court. No fees will be asked of the litigants, who will thus be placed on equality with the well-to-do in their ability to secure justice.

In the United States, by reason of the prevalent practice among lawyers to take cases upon speculation, the condition of the poor is not so bad as it has been in England in the matter of obtaining legal redress. Nevertheless, even in this country, the high cost of litigation has hampered, if not absolutely prevented, many people of small means from seeking justice in the courts. This condition has been somewhat ameliorated by the legal aid societies of one kind and another which have been organized in many of the large centres for the purpose of assisting the poor who are unable to employ counsel. A unique scheme of this kind prevails in the city of New York. Well-known lawyers and law firms of that city joined forces with the Legal Aid Society and effected an arrangement by which they become retaining members of the society. Under this arrangement the attorney, instead of doing the work of the poor for nothing as it comes his way, makes a contribution each year as a retaining member of the Legal Aid Society. At the same time he gives the benefit of his advice, when occasion demands, to the society and thus systemizes what charity work he does. Lawyers to become retaining members pay $50 a year if they have been practicing for fifteen years, and $25 if for a shorter period. The new arrangement, it appears, has already been of great value in furthering the work of the society, and is bringing the legal profession into touch with the organization to a remarkable degree. In the city of St. Louis the Director of Public Welfare is planning to submit to the new board of aldermen, to be elected next April, an ordinance providing for a free legal aid bureau, with a staff of twenty-five young lawyers who, under the supervision of two capable attorneys of long practice, will try lawsuits for residents of St. Louis who are without means to prosecute their cases. It is thought that many young lawyers, just beginning to practice, will be glad of the chance to have the practical experience in court afforded by the proposed free bureau in the handling of cases of merit.

At first thought it might seem that free legal bureaus would unfairly encroach on the business of the lawyers. Much of the work of such bureaus, however, would be of a kind that most lawyers can profitably dispense with. The existence of these agencies, moreover, would relieve the lawyers of a large amount of charity work which the obligations of their profession now impose upon them. In any case free legal aid to the deserving poor appears to be in the line of progress and social betterment. It will be a step toward a more ideal administration of the law when justice shall not wait upon the longest purse but will be meted out with an even hand to rich and poor alike.

Right of Appellate Court to Direct Final Judgment.

It is not often that a state court under the exigencies of state policy places itself in opposition to a decision of the Supreme Court of the United States. This was done recently by the Massachusetts Supreme Court in *Bothwell* v. *Boston Elevated R. Co.*, 215 Mass. 467. In that case the court holds valid a statute which provides that in civil cases where at the trial a request has been made that on all the evidence a finding or verdict be returned for either party, and such request has been denied and a finding or verdict has been rendered contrary thereto, and it shall be held by the appellate court that such request should have been granted, the appellate court may direct the entry in the trial court of judgment for the party in whose behalf the request for the finding or verdict was made and erroneously refused. Such a statute, the court holds, does not violate the right to a trial by jury which is guaranteed by the state constitution. On the other hand, in *Slocum* v. *New York Life Ins. Co.*,

228 U. S. 364, it is held that "the right of trial by jury" secured by Article 7 of the Amendments to the Constitution of the United States does not permit the entry, after a verdict in favor of one party, of a judgment for the opposing party under circumstances like those in the Massachusetts case. In the Slocum case the question arose in reviewing the action of the Circuit Court of Appeals which, under the Conformity Act (U. S. Rev. Sts. § 914) and following a Pennsylvania statute, had entered judgment in favor of the party for whom the trial court erroneously refused to direct a verdict. The substance of the decision of the United States Supreme Court is that it is an unconstitutional exercise of the power of legislation to authorize the entry of judgment in a case where a trial by jury has been had, except in conformity to the verdict, and that, although the error committed by the trial court may consist solely in its refusal to direct a verdict in favor of one party, yet after a verdict wrongly rendered in favor of the adverse party as the direct result of such erroneous refusal, the only method for correcting that error within the reach of the legislative or judicial departments of government is to order a new trial, and this because of the scope of the meaning of "trial by jury," as secured by the Seventh Amendment to the Federal Constitution.

Of course the decision in the Slocum case is not a final or binding authority on the state courts, for the reason that the Seventh Amendment does not control the action of the several states in abridging trial by jury in their own jurisdictions; it applies only to the courts and Congress of the United States. Nevertheless, the decision in the Slocum case does challenge the constitutionality of the Massachusetts statute and other like statutes, since in that state as well as in other states of the Union the right of trial by jury is constitutionally secured. In many of the states statutes similar to the Massachusetts statute have been enacted. In these states, therefore, we shall have a conflict between the state and federal courts on a matter of procedure that makes a close approach to substantive law. It should be stated, however, that the decision in *Slocum* v. *New York Life Ins. Co.* was rendered by a bare majority of a divided court, four of the justices joining in a dissenting opinion. This fact will afford some warrant for the continuance of a practice in the state courts which certainly makes for expedition in the final determination of causes.

Success at Bar as Obstacle to Judicial Preferment.

LEVY MAYER, one of the leading lawyers of the West, in a recent address before the Chicago Bar Association, declared that eminence and success in a lawyer act as an obstacle to judicial appointment. "The fact that a lawyer has amassed the returns of a large and successful practice at the bar, has had a practice among varying clients, vested, corporate, or the reverse," said Mr. Mayer, "is now considered an objection in the qualifications of men who are to be appointed to the bench. It is painful that the penalty which the lawyer now suffers for his success at the bar is the forfeiture of all judicial aspirations. The current literature seems to teach that the lawyer who represents large corporations would, if he went on the bench, be the hireling of those interests. We lawyers know that no matter what clients we have had at the bar, that when we ascend the bench those clients would be the first to receive condemnation from the bench by those lawyers who at the bar had represented the class of clients that are frequently acclaimed as transgressors and violators of the law. I do not mean to criticise the appointing power, but I think the moment is opportune to recur to the fact that the discharge of judicial functions has rested with the great lawyers of the past, and that exercise of those high duties with equal ability, success and distinction is likely to be greatly hampered by the unfortunate opposition that now exists in all political parties and in the mind of the general public against successful lawyers."

There may be some basis in fact for Mr. Mayer's lament, at least so far as concerns the judgeships that are conferred by the electorate. In recent years large business and industrial organizations have been suspected of conducting their affairs in ways that are inimical to the public interests. They have had the assistance of astute and able lawyers. It should not be a matter of surprise, therefore, if some of the odium that has fallen upon the magnates of business has attached to their coadjutors at the bar, and that the people in seeking available candidates for judicial position should look elsewhere than in the ranks of corporation lawyers. There may be, however, a more valid reason for passing by the busy practitioner when appointments are made to the benches of the higher courts. Selections for the supreme court, both state and national, are quite uniformly made from among the incumbents of the inferior courts. In a sense judgeship is a vocation, and there, as in other vocations, experience counts for much. The judicial temper is more likely to be found in one who for years has had occasion to exercise it than in one whose life has been spent in the hurly-burly of active practice. But let not the able lawyer be jealous of the wearer of the ermine. Professional eminence is as praiseworthy and as much to be desired as judicial eminence. There is a galaxy of lawyers as well as a galaxy of judges. In our legal Valhalla the fame of Choate, of Webster, and of O'Conor is as secure as that of Marshall and Story and Taney. The able and conscientious lawyer and the righteous judge are co-ordinate in the administration of justice: *par nobile fratrum.*

The New York Workmen's Compensation Act.

THE efficiency of the New York Workmen's Compensation Act was well illustrated in a recent case in Brooklyn. An employee of the electric light company of that city was killed in the course of his employment. He left a widow, and a home on which there remained unpaid a mortgage of $2,800. Instead of instituting a damage suit and awaiting a tedious inquiry as to the company's negligence and the dead man's contributory negligence, or accepting a small sum in settlement to avoid the law's delay, as would have been necessary under the old liability system, the widow presented her case before the Compensation Commission, which at once set in motion the machinery for the proper proving of the claim. The claim having been duly proved, the commission, computing the monthly payments, paid the $2,800 mortgage, and there still remained a substantial balance for small weekly payments to the widow. All this was accomplished speedily and without the intervention of an attorney or any other go-between. It is but one of the many instances of the beneficial working of the new law.

Discussing the new law a member of the state commission said recently: "Through the administration of the workmen's compensation law by the commission the workingmen of this state are not only compensated for losses sustained as the result of industrial accidents, upon cases duly completed through their own efforts, but the state in reality renders great assistance in completing the proof, and especially is this true in the more serious cases. The commission can make an award only upon the finding of facts, and in order to justify its action it often has to make independent investigations which, incidentally, are thus made for the claimant himself. In addition to this the state in its effort to expedite the handling of claims sends out independent investigators for the sole purpose of making speed. For instance, one hundred and thirty-five death cases were recently apportioned among the districts of the state to which deputies have been assigned. The deputies were called in, and each man was given his proportion of cases with instructions to prove them up quickly; in consequence of which the next few days will see the calendar loaded with death cases. Under the old liability plan most if not quite all of these cases would have required a lawsuit and many months of torturing delay before the beneficiary could receive any recompense. In fact, it is the history of these damage cases that even the winner in the long run is also the loser. The old plan kept the word of promise to the ear, only to break it to the hope. Let us see how the law affects the public, who, for the time, let us say, are neither employers nor employees. The public are affected as citizens and taxpayers, maintaining courts and juries to try damage cases, maintaining poorhouses to take care of the destitute, maintaining hospitals for the free treatment of cases, maintaining charity organizations whose purpose is to hunt out the unfortunate, many of whom have been driven into despair because of the result of industrial accidents. The compensation law for the public as well as for the employer and employee ushers in a new day. The public knows that all loss is absolute somewhere, and that if it is taken care of through the application of the broad principle of insurance and made a proper charge in the calculation of the cost of production of manufactured articles, that would be a more just plan than was the old plan of making the workman carry alone all the risk of accident and the consequent losses."

The Workmen's Compensation Act has of course taken away a considerable amount of legal business from the lawyers. On the other hand it has largely removed the scandal of the ambulance chaser and the shyster claim agent. Personal injury suits having been reduced to a negligible minimum, these predatory camp followers of the legal profession will have to direct their activities into other, and it is to be hoped, more praiseworthy channels.

The Uniform Laws Commission.

IN a communication to the New York *Evening Post* Charles Thaddeus Terry, the president of the conference on uniform state laws, writes interestingly on the work of the Uniform Laws Commission during the twenty-four years of its existence and mentions a few of the more important acts which will be presented at the coming conference at Washington, D. C. The Uniform Laws Commission is composed of commissioners appointed by the governors of the different states. Each state, as a rule, has three commissioners, and in addition to all the states, the Territories of Alaska, Hawaii, Porto Rico, and the Philippine Islands are represented in the conference. The commission had its origin in a committee appointed over twenty-five years ago by the American Bar Association to discuss the desirability of greater uniformity in state laws. As a result of its action the legislature of New York state in 1889 created a Board of Commissioners on Uniform State Laws, and invited the other states to meet in annual conference. Two years ago, when Nevada named her commissioners, every state had put itself on record as favoring the principles of uniformity in interstate acts. The object of the conference, Mr. Terry states, is to bring into harmony and workable simplicity the conflicting laws of the various states, particularly in those matters which affect every-day business and social affairs. Its province is "not to formulate or propose new laws, but to mould into uniformity of provision the laws of the various states which have an interstate application." "If we are to be and remain a nation," says Mr. Terry, "the rights of citizens must be clear and uniform throughout the various sections of the country, so far as those rights are of interstate nature. Either the states must bring about such harmony or the federal government must do it. For the federal government to do it means centralization, and it means at the same time an extension of the powers of the central government far beyond anything contemplated at the organization of the government or established by the Constitution. The states must all pull together or they will all pull apart. The ever varying laws enacted by the states and by the federal legislature tend to create a confusion and complexity irritating to laymen and lawyers alike, and they have constituted one of the most serious problems arising from the American dual system of government. The problem concerns not only commercial interests and business transactions, but domestic and other sociological relations as well. What would be thought of a country in which one might take a promissory note for $5,000 in New York for cash loaned by him, only to find that if he tried to use the note in Ohio or Illinois or Iowa or California or some other state, the instrument would prove to be not at all what he thought it to be, and subject to defences which would not be available in the state of New York, where he took the note? That would be an anomalous situation in a country which we are in the habit of regarding as a unit. And yet, up to the time when the conference of commissioners began its work such injustices might occur. To-day, by virtue of the effort for the uniformity of state laws, the law of promissory notes and of all negotiable paper has been standardized throughout forty-six jurisdictions in the United States. And again, although it is but a comparatively short time since the commissioners drafted and submitted to the various legislatures a uniform law governing warehouse receipts—those documents which form one of the foundation stones of the system of bank credits and of general credits everywhere—already thirty states have put that uniform act upon their statute books."

During the twenty-four years of its existence it appears that the commission has adopted and presented to the different state legislatures ten uniform acts. In the order of their adoption, with number of states that have placed them upon their statute books, they are: Negotiable Instruments, 46 states; Warehouse Receipts,

30 states; Bills of Lading, 11 states; Sales of Goods, 11 states; Certificates of Stock, 9 states; Divorce, 3 states; Child Labor Act, Family Desertion, 6 states; Probate of Foreign Wills, 9 states, and Marriage Evasion Act, 3 states. The two most important acts to be presented at the approaching conference will doubtless be uniform acts for workingmen's compensation, and for incorporation. After five years of careful work, the committee appointed by the Uniform Laws Commission has announced that it has prepared a uniform incorporation act which it believes will answer the purpose of safety to the public and justice to the corporations.

AMERICAN BAR ASSOCIATION COMMITTEE REPORTS.

AT the last annual meeting of the American Bar Association which this year held its sessions in Washington, D. C., on October 20-22, the various standing and special committees as usual presented in the form of printed reports a résumé of the work accomplished by them during the year together with their suggestions and recommendations. As many of the latter embody proposed legislation of more than passing interest to the profession, an epitome of some of the more important reports is here given.

Commercial Law.

The Committee on Commercial Law recommend: (1) That the American Bar Association pass a resolution indorsing Pomerene Senate Bill No. 387 relating to bills of lading in interstate and foreign commerce. This bill is now in the hands of the House Committee on Interstate and Foreign Commerce. It represents the result of the labors of the Commissioners on Uniform State Laws of the American Bar Association after repeated conferences with representatives of the American Bankers' Association, the railroad organizations, and the shippers' associations. It was originally prepared for the purpose of having it enacted by the various state legislatures, so as to provide uniformity of legislation upon this subject. It has already been enacted by ten of the leading commercial states—Connecticut, Illinois, Iowa, Louisiana, Massachusetts, Maryland, Michigan, New York, Ohio, and Pennsylvania. The pending bill does not vary substantially from the acts passed by the legislatures of the several states just named, save that it is made applicable to interstate and foreign commerce. It modifies the law as laid down in 1889 by the Supreme Court of the United States in the case of *Friedlander* v. *Texas, etc., R. Co.*, 130 U. S. 416, which held that "a bill of lading fraudulently issued by the station agent of a railroad company without receiving the goods named in it for transportation, but in other respects according to the customary course of business, imposes no liability upon the company to an innocent holder who receives it without knowledge or notice of the fraud and for a valuable consideration" by declaring:

"SEC. 25. That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to (*a*) the consignee named in a straight bill or (*b*) the holder of an order bill, who has given value in good faith for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue."

Other defects in the present law which it is sought to correct by this bill may be classified under the heads of (*a*) Shipper's load and count; (*b*) Duplicate bills of lading; (*c*) Altered bills of lading; (*d*) Spent bills of lading; (*e*) Forgeries.

(2) That the American Bar Association pass a resolution commending the continuation of the National Bankruptcy Act and that the various bills pending to repeal the same be defeated and that the consideration of the various bills pending to amend the same be postponed to a future date.

(3) That the American Bar Association pass a resolution to the effect that Cummins Senate Bill No. 4522, the object of which is to make carriers engaged in interstate commerce liable for the actual loss, damage, or injury to such property caused by them, notwithstanding any limitation of liability or of the amount of recovery in any receipt or bill of lading or in any tariff filed with the Interstate Commerce Commission, save in one or two cases, is not now in such form as to receive the endorsement of the American Bar Association, and that Congress should pass a law creating a commission to codify the law as to the mutual rights and obligations of carriers and shippers as affecting interstate and foreign commerce, including the subject of restricting the common-law liability of common carriers, and that the remedy for any existing evils is not by "piecemeal" legislation.

(4) That the American Bar Association co-operate with the International Association to obtain an international agreement in respect to Atlantic heavy timber deck cargoes exported from the United States in the winter season, and that a resolution be passed requesting Congress to take appropriate action to provide for representation by the United States in any international conference that may be called for that purpose.

(5) That the American Bar Association approve the purposes of the international conference for the unification of laws concerning bills of exchange and checks.

(6) That the American Bar Association pass a resolution requesting Congress to take appropriate action authorizing official appointment of American delegates to the international conference for the unification of the laws concerning bills of exchange and checks or either of them.

(7) That (in view of the character of subjects referred to and considered by the committee) the constitution of the American Bar Association be amended so that the Committee on Commercial Law shall be known hereafter as the "Committee on Commerce, Trade and Commercial Law."

International Law.

The Standing Committee on International Law in its annual report expressed a desire to unite with the Committee on Commercial Law in recommending:

(1) That the American Bar Association approve the purpose of the international conference for the unification of laws concerning bills of exchange and promissory notes, and that Congress should pass appropriate legislation authorizing the appointment of American delegates to such conference.

(2) That the American Bar Association co-operate with the International Law Association to obtain an international agreement in respect to deck cargoes exported from the United States in the winter time, and that Congress take appropriate action to provide for representation by the United States in any international conference that may be called for the purpose.

Also in accordance with its custom of many years standing the committee in its report briefly enumerates the treaties negotiated, confirmed or proclaimed by the United States and the main incidents affecting the international relations of the United States since the report of the preceding year.

Uniform Judicial Procedure.

The Committee on Uniform Judicial Procedure reported that the Clayton Procedure Bill (H.R.133) which authorizes the Supreme Court to prescribe forms and rules and generally to regulate pleading, procedure, and practice on the common-law side of the federal courts, has received the unanimous approval of the Committee of the Judiciary of the House of Representatives, and that while as yet the Senate Committee on the Judiciary has made no report thereon, the committee is assured that it is considered with favor and will, in due course, be reported as it now appears on the calendar of the House of Representatives. Owing, however, to the fact that Congress, during this entire session, has had its attention centered upon certain legislation to the elimination of all else, little hope can be entertained this year for legislation looking to the relief of the courts.

Delay and Cost in Litigation.

The special committee charged with the duty of considering alleged evils in judicial administration and remedial procedure, and of suggesting remedies and formulating proposed laws to prevent delay and unnecessary cost in litigation, reported that the bills for reform in federal procedure (referred to in previous issues of LAW NOTES) which have been advocated by the Association and by the committee as its delegates since the annual meeting in 1910, have not as yet been enacted into law, although their importance has been frequently and consistently urged both upon the committees of the Senate and the House and on the President. But, says the committee, "the many engrossing matters of legislation which have been before Congress seem both to the Senate and the House more important than the reforms in procedure recommended by the Association."

The committee also reports that it has consistently opposed all legislation looking towards the application to controversies in labor cases of rules different from those applied in all other cases of injunction, and it consequently registers in emphatic terms its denunciation of the injunction section of the anti-trust legislation which has passed the House and is now pending in the Senate.

Bills Relating to Courts of Admiralty.

The special committee to present to Congress three bills relating to the courts of the United States sitting in admiralty reported as follows:

(1) The bill relating to liens on vessels for repairs, supplies and other necessaries was, as shown by the report of the special committee dated July 25, 1913, enacted by Congress and duly approved by the President on June 23, 1910.

(2) The bill to authorize suits against the United States for damages by vessels owned and operated by the government has made no progress in Congress since the last report of the special committee.

(3) The outlook continues favorable for the adoption by Congress of a bill relating to the maintenance of actions for death on the high seas and other navigable waters, and it is believed that the measure has in the last year substantially advanced toward its passage.

Government Liens on Real Estate.

At the last meeting of the Association the subject of the "Removal and Disposition of Government Liens" was referred to the Special Committee on Government Liens on Real Estate. This committee reports that under the law as it now stands a person may loan money and as security for the same acquire a lien by mortgage or other instrument on real estate and by reason of the default of the borrower in the payment of a revenue tax or other obligation to the government of the United States, the government may establish its lien against the same property which may be in every respect subordinate to the lien acquired by the lender of money secured by mortgage or to other liens acquired in good faith by persons long before the lien of the government attached, and yet there is no method by which the prior lien can be foreclosed and the equity of redemption of the mortgagor relieved from the lien of the government without the consent of the officers of the government, as the government cannot, without its consent, be made a party defendant to a suit to foreclose such lien.

To remedy the great hardship thus imposed on those who may have acquired in good faith mortgage or similar liens against property at a time when no other lien existed against the property in question, the committee submitted to the Association for its approval and recommended that the necessary steps be taken to bring about the enactment into law of a proposed act which in effect provides that the United States may be made a party defendant to any suit or proceeding which may be instituted by the holder of such prior lien or incumbrance, provided such suits or proceedings are instituted in the United States District Court for the district in which the property subject to such lien is situated.

Insurance.

The Committee on Insurance Law which at the last meeting of the Association was authorized to co-operate with the Senate and House Committees of Congress on the District of Columbia in the preparation of a model insurance code for the District of Columbia, with a view to its ultimate adoption by the several states, after its presentation to, and approval by, the Association, reported that in pursuance of such authority, it had prepared a tentative draft of a proposed code of laws regulating insurance in the District, which after deliberation was modified and then directed to be printed in order that it might be submitted to all those interested in the subject for their criticism. But as the proposed bill, as so modified and printed, is still regarded by the committee as a tentative draft and has not yet been subjected to the criticism

it should have before being submitted to the Association, the committee recommends that it be authorized to continue the work of preparing the proposed model code for the regulation of insurance in the District of Columbia and to report the proposed code, when it is completed by the committee, to the Association and to the Senate and House Committees on the District of Columbia.

Taxation.

The report of the Committee on Taxation is taken up with a thorough discussion of the legal and administrative phases of the present law imposing an income tax on individuals. While it indulges in many and detailed criticisms of the existing law, these, in the main, must be regarded as uncontroversial from a political or economic point of view, and as looking merely toward an improvement of the law from a formal and technical standpoint. Apart from the specific defects pointed out in the report, which are too numerous to be set forth in detail here, the structure and language of the act as a whole is by the committee deemed to be open to the gravest objection. It therefore considers that any revision of the law should extend to its form as well as to its substance. Says the committee: "The entire act should be reconstructed, and there should be placed upon the statute book an income tax law so arranged and expressed as to be convenient for reference, consistent in all its parts and capable of being understood by a citizen of average intelligence."

Law Reporting and Digesting.

The Committee on Law Reporting and Digesting in its report reiterates its great concern at the heavy burden imposed on the American bar by the constantly increasing volume of the reported cases, and it insists on the necessity of lessening the rate of increase by discrimination in the publication of opinions and by greater brevity in the opinions themselves. While conceding that so long as the law is built on the authority of decided cases there is need for the publication of all the cases in which the law is developed and by which its principles are applied to new conditions, it maintains that there is no need, at least in a series intended for general use throughout the country, for reporting decisions that deal only with questions of fact or in which familiar principles are applied to ordinary states of fact. Says the committee:

"The citation of such cases is not helpful to the courts, nor does it tend to the thoughtful study of the law. The principles of law have been well settled. They have been stated in ruling cases, in text books of recognized authority and of late in cyclopedias with references to the cases in which they have been declared and applied. The profession could well do without reports of any cases which do not in some way modify these statements of legal principles or furnish some substantial new illustration of the way in which they may be applied."

Referring to an increasing tendency to uniformity in the statutes of the various states, and remarking that the unity of the country in social and business affairs makes it necessary that business men as well as lawyers having anything more than a local practice should be able readily to inform themselves of the laws of many states on a great number of subjects, the committee suggests that it is desirable that there be substantial uniformity of plan and classification in digests of the statutes of the various states. To the accomplishment of this end and for the purpose of retarding the increase in the volume of the reports, since effective action cannot be taken without co-operation among the several states, the committee recommend that a special committee be appointed consisting of one member from each state to consider these matters, and to confer with members of the bar and with judges and reporters and to take such action as they might think best to bring about the desired results.

Legislative Drafting.

The Special Committee on Legislative Drafting which last year was instructed to prepare for submission to the Association, if further investigation should show that such preparation is practical, a legislative manual or code containing a collection of directions or suggestions for drafting laws, and model clauses for constantly recurring statutory provisions and problems, reported that it had come to the conclusion that the only way to make certain that the preparation of the proposed manual is practical was to select parts of the proposed code likely to present different classes of problems and prepare a tentative draft of these parts. Therefore the committee prepared and submitted with its report a tentative draft of those parts of the proposed manual dealing with:

Topic I. Language and Arrangement of Statutes.

Topic IX. Adoptive Acts.

As the tentative drafts of the parts selected cover topics requiring widely different treatment, the committee believes that they demonstrate that it is practical to create such a manual, and furthermore that they also prove that the manual, when created, will have great practical value. It therefore recommends that the committee be continued and directed to prepare such a manual for submission to the Association.

The committee reports also that great progress has been made in the establishment of official reference and drafting bureaus in New York, Illinois, New Jersey, Virginia, New Hampshire and Georgia, and that, moreover, Congress has appropriated $25,000 for legislative reference work under the direction of the Librarian of Congress.

A summary of the laws now in force providing for such official drafting and reference agencies accompanies the report.

THE RELATION OF LIGHT TO THE PROOF OF DOCUMENTS.*

By ALBERT S. OSBORN, Examiner of Disputed Handwriting and Documents, New York; author of "Questioned Documents."

I CAN think of no association that bears a name which affords such a temptation to the manufacture of figures of speech as an Illuminating Engineering Society. The name at once suggests the dark places that need your assistance. Every department of human activity does indeed need illuminating engineers and what we all want everywhere and all the time is more light.

Light is an important factor in the proof of documents and light engineers can promote justice by making it easier to prove

*A paper read at the eighth annual convention of the Illuminating Engineering Society, Cleveland, O., September 21-24, 1914.

the facts regarding disputed documents. Anything relating to the subject of illumination that affects the quality of human vision is of vital importance in all forgery investigations. Justice has been defeated many times because court-rooms like cathedrals have been lighted with a dim light somewhat in harmony with some of the hampering old legal precedents. Partly because of poor illumination, judges and jurors in many instances have not been able to see properly, where the case depended chiefly upon visible evidence. This partial blindness in the past has been due in some degree to an ancient legal procedure that threw a twilight gloom around legal investigations, weaving such a network of restrictions about them as made it difficult to prove a physical fact. Strange to say, objections are still made to the use of the microscope, to photographs, and aids of every kind, and these objections, even in these days, are now and then sustained. All these old restrictions have been intensified by poor lighting and improper physical surroundings as well as by individual but unconscious deficiencies in seeing ability, for there is in fact a form blindness akin to color blindness.

When the necessity arises for proving a somewhat obscure physical fact by visible evidence this whole question of human vision with its defects and limitations becomes a question of vital interest. In the first place, it is important to realize that seeing ability is not by any means the same with all observers. It is an encouragement to improve our sense of sight to realize that only part of our skill comes by nature and that much comes from study and experience.

It is also helpful to consider just how it is that we actually see what we think we see. We all know that when we hear sounds we perform a mental operation and from these sounds infer certain things. From arbitrary combinations of sounds, for instance, we get an English word which conveys an idea, or from another combination a German word, and from still another combination we infer that a man is walking or a horse is running. When we see things, however, we are inclined to assume that we are receiving directly in the brain positive information instead of certain sensations which we must mentally interpret just as we have interpreted the sounds.

In much greater degree, therefore, than we are inclined to admit it is no doubt true that we really see but little more than we are able to compare with some experience or standard that we already have in the brain. The savage does not really see a steam engine, or a watch, or a city, and in some degree we are all in the savage class. The thoroughness of this mental comparison and the final accuracy of sight depend upon two things, the force and clearness of the sensation that reaches the brain and the experience which the brain already possesses. The necessity for seeing clearly, therefore, is that we may interpret accurately.

This whole question of human vision and the aids that perfect and intensify it is naturally closely related to the question of discovering forgery and the numerous other physical conditions that may point to fraud of various kinds in connection with disputed documents, and is of special importance in connection with the showing and proving of these facts in a court of law, often against prejudice and usually with untrained men who must be made to see and understand. It is therefore essential that sense impressions of all kinds be clarified and intensified in every way possible, and the arrangement, distribution, and management of light has a most important bearing on the subject.

Under the old legal practice, now happily but all too slowly passing away, expert testimony regarding forgery and documents, involving as it does many technical interpretations of visible evidence, was mainly the giving of bare oral opinions on a contested question in courts of law. This practice, much criticized and discredited, still continues in certain cases relating to insanity and some other subjects that the ordinary man, no matter how assisted, is unable to pass upon intelligently. A new practice, however, has developed in most jurisdictions in connection with proof of physical facts relating to documents, by which referee, judge, and jury are actually shown the basis for whatever opinion is given, so that with the assistance of reason-giving testimony, now admitted in almost all courts and with the aid of instruments and enlarged, properly grouped photographic illustrations, they can finally reach their own conclusions regarding the disputed fact. Testimony is not simply oral, as in the past, but visible as well.

With the new and enlightened procedure and a court-room where seeing and hearing are possible, numerous surprising verdicts in cases of this class have been rendered. Three recent New York cases are conspicuous examples. In the first, four alleged eye-witnesses, two of them of irreproachable character, testified to the execution of a will, and a jury decided it was not genuine; in the second, six witnesses testified that they saw a certain contract signed, and a jury decided the document was a forgery; and in the third, a jury convicted a distinguished member of the bar of forgery of only two short words in typewriting that, by comparison, were shown to be written on his own typewriter.

It will readily appear that this change of practice regarding visible evidence makes necessary such an illumination of court-rooms or trial chambers as makes it possible to see with the utmost distinctness. To the end, therefore, that visible evidence in cases of this class, and in all kinds of cases, may be presented with the utmost clearness and force it is highly important that an illuminating engineer be consulted in regard to the arrangement and lighting of every court-room.

Another reason why court-rooms should be properly arranged and lighted is to enable judge and jury to see witnesses with the utmost distinctness as testimony is being given, as well as to hear them. That this result may be attained it is necessary that witness-box, jury-box, and judge's bench be arranged in proper relations to each other and near together. Fortunately, there is in all of us a kind of instinct, enforced by conscious and unconscious training, by which we judge whether or not those who speak to us are telling the truth. This important faculty is dependent upon both the senses of sight and hearing. We recognize at once an insincere tone; even dogs and children judge us in an occult and unknown manner. By the use of the eye as well as the ear, we unconsciously interpret all messages that come to us as exaggerated, true or false. That ancient requirement of the law that "the accused must be confronted by the witnesses against him" was no doubt in some measure based upon this important faculty by which truth is separated from falsehood. A witness should be placed close to and nearly, if not quite, facing the jury or the judge who is to decide upon the truth or falsity of his testimony, and the room should be so lighted that his attitude, appearance, and every changing expression is distinctly seen. Few of us have ever analyzed the evidences of sincerity and of untruthfulness as shown by hearing and sight, but we can understand how, at least to some extent, it can be done.

A visit to many a court-room is sufficient to show how such a room should not be arranged and should not be lighted. Artistic and architectural considerations, in many cases, would seem to be the only ones that had been consulted in the arrangement. In many a city of our land, of all places, the court-room is the one place where it is most difficult to hear and the most difficult

to see, and the administration of the law could be greatly aided by the lighting engineer, the ventilating engineer, and the acoustic engineer. Trials should be held where every word spoken can be heard distinctly and where every piece of visible evidence can be clearly seen for exactly what it is.

There are many court-rooms so dimly lighted and so improperly arranged that it is almost impossible in them to prove forgery when such proof must be based upon the correct interpretation of delicate but highly significant visible evidence. In some few cases court and jury leave their accustomed places and in an informal and sensible manner gather around some low-placed, clean window where all can see and all can hear.

In connection with the proof of many different questions relating to disputed documents correct and adequate illumination is absolutely essential if the facts are to be proved. Vital evidence is sometimes based entirely upon the interpretation of indistinct stains, or delicate tints or colors which, under the dim light provided, all become a dull and indistinct gray. In cases involving chemical erasures, in which certain indistinct yellow stains are of the utmost significance, such evidence is practically invisible under the yellow, flickering artificial light or the dim daylight of the average court-room. In many court-rooms the effective use of a microscope is simply impossible.

In many cases involving the identification of paper, where sheets have been interpolated in disputed documents, the case could be positively proven out in the court-yard, but under the conditions provided, intensified by the bad acoustic properties, injustice may triumph or the guilty may escape. Many a city in this land has spent millions of dollars on a court-house without one properly lighted and well-arranged court-room where clear seeing and distinct hearing are possible. Darkness and evil have always been associated and still are associated in many a court-room. The modern laws of some states happily require a certain amount of properly placed light in every school house, but such laws, it would seem, have not yet been applied to the law houses.

Light is also a great aid to justice in connection with the subject of photography as now applied to the investigation and proof of disputed documents. To the modern examiner of disputed handwriting and documents the photographic camera bears a relation to the business similar to that of the compass to the mariner. The relation of light to this question of photography is as close as the etymology of the word itself suggests. It writes out in a universal language its unmistakable interpretation of many things. Many disputed document cases are hastily settled as soon as they are properly illuminated by the photographic camera.

The camera assists us to see certain things which without its aid are too small for us to recognize in their true significance and force. It is one of the natural but erroneous human assumptions that we see all that exists before us, but we know that this is not true, and thus arises the necessity in connection with many questions of properly enlarging the thing to be observed. Many forgeries are perfectly apparent when enlarged a few diameters. The photograph also makes it possible to cut apart, group, and arrange the parts of a disputed document for effective study and comparison.

As is well known, the whole photographic art is based upon the arrangement and control of light, and certain hidden facts in a forgery can be clearly shown in a photograph by certain special arrangements of light. In a laboriously perfected forgery in which the lines have been carefully retouched and overwritten so that under ordinary vision the result seems to be perfect, a transmitted light photograph under proper enlargement is often sufficient to prove the fraud. By this means the varying thicknesses of the ink film itself are measured by measuring its ability to transmit light. If a line is retouched skillfully so that the edges are not broken or disturbed such additions under ordinary vision may be invisible even under magnification, but a transmitted light photograph of such a stroke, enlarged from four to ten diameters, will show in permanent form with the utmost distinctness every added stroke. In making a photograph of this character the document is lighted partly from the front, but with the strongest light from the back so that the light which makes most of the photograph is actually transmitted through the paper itself.

The transmitted light photograph is often more effective than the microscope to show retouching, but for preliminary investigations of this kind and also for direct demonstrations in court the following special application of light is of great aid. A microscope table with a glass top having a strong light close underneath is provided. This combination is very useful, especially when employed in connection with the stereoscopic microscope. An arrangement of this kind in the leading banks of the land, available for instant use, would save thousands of dollars every year, as by its aid an experienced observer, in many cases, is literally able to "see through" a forgery. By this means light is literally thrown on the subject.

Another condition under which special illumination is of great value is in the interpretation of certain kinds of erasures, especially erasures of pencil lines. The disposition of thousands of dollars may depend upon the interpretation of a few words or even a few figures and the determination as to whether or not they have been changed. Unlike an ink line, an ordinary pencil mark is made by sufficient pressure on the writing instrument so that a certain amount of graphite is worn off against the surface of the paper. If a mark of this nature is carefully erased so that the coloring matter is removed, it may become entirely illegible, although the depression still remains but is so shallow that it is invisible even under the microscope. If, however, such an erasure is photographed in enlarged form with a strong illumination through a narrow slit on one side with the rays of light almost parallel with the surface of the paper, the shallowest depression, where a word or figure has been so effectually erased that it is totally invisible under any other examination, then produces a shadow which, in a photograph of this kind, sometimes shows with absolute distinctness what was originally written.

Another class of cases under which the question of perfect illumination is of vital importance is in all ink investigations either to determine age or to discover whether two or more ink writings are identical or different. Some of these questions can no more be answered under the illumination of certain court-rooms than they could be answered in the light of the average cellar, while the same investigation if conducted under properly diffused white light shows a result that can be seen and appreciated by any intelligent man. It is easy to understand how desirable it may be under certain circumstances to show that writing is not as old as it purports to be, or to show that an addition or interlineation in ink is the same or different from other parts of the same document. The interpretation must be based mainly upon the recognition of certain colors. Under suitable conditions and proper lighting this recognition is possible with the average observer. In many court-rooms such facts cannot be proved.

All ordinary commercial ink of the present day is a chemical solution to which a temporary blue color is added so that the writing may be legible when first written. Fresh writing of

this kind, as we are all aware, is of a distinct blue or bluish green color, which color gradually disappears as it is submerged or masked by the development of a stronger color from the chemical constituents of the ink, until it finally reaches a black or neutral gray. When used during the winter months modern ink, under the usual conditions under which writings are kept, requires many months to lose all its initial blue color, so that examinations like those described, to show that the ink is not as old as it purports to be, may be made a long time after the actual date of the writing. Wills and documents representing hundreds of thousands of dollars are brought into courts of law, purporting to be many years of age, on which the ink color has not yet reached its ultimate degree of blackness or intensity.

By the use of a special color microscope with two objectives and the Lovibond tintometer glasses it is possible to match and record this changing ink color with great accuracy. For example, it is easily possible to match more than a thousand variations in the color blue alone. If an ink of this class is accurately matched and recorded as it first appears on a document purporting to be several years of age and then the same portion of ink is observed under the same conditions a few days or weeks afterwards and the ink has distinctly changed from a blue or distinct purple to a black or a much darker color, this is positive proof that such document is not as old as it purports to be. Most persons can recognize colors under favorable conditions, but the recognition and matching of colors in an investigation of this kind in the ordinary court-room under the conditions ordinarily provided is simply impossible. If evidence of this class is to be made use of, it is necessary that the ink should be observed under diffused white light of the proper intensity.

Another most interesting special application of light that promises to assist in disputed document cases makes use of those strange new rays of the spectrum out beyond the violet. By the use of a suitable screen and appropriate illumination it is possible to photograph totally invisible stains resulting from a chemical erasure so that the original writing becomes entirely legible.

Thus we see the advancement of knowledge in every field supplements that in every other field, and light engineers may be of great service in illuminating unexpected dark places in various divisions of human activity.

POINTS IN LEGAL ETHICS.

From the New York County Lawyers Association Committee on Professional Ethics.

A LIST of questions submitted to the Committee on Professional Ethics by the sub-committee appointed at the conference of the (*a*) Committee on Professional Ethics, (*b*) Committee on Unlawful Practice of the Law, (*c*) a special committee of lawyers organized to aid in elevating the professional standards of the practice of commercial law. The several specific interrogatories appear below immediately preceding the answers thereto.

Preamble to Answer. In answering this series of questions the Committee is guided by its view that the practice of the law is a profession and not a trade or a business; therefore some methods which are unobjectionable in a trade or business may still be open to criticism in an attorney because they detract from the objects for which his profession exists. It is a profession, not only because of the preparation and qualifications which are required in fact and by law for its exercise, but also for the primary reason that its functions relate to the administration of justice, and to the performance of an office erected and permitted to exist for the public good, and not primarily for the private advantage of the officer. Such private advantage, therefore, can never properly be permitted to defeat the object for which the attorney's office exists as a part of the larger plan of public justice.

With these considerations firmly in mind the Committee expresses its opinion in answer to the specific inquiries, as follows:—

I

(*a*) May A.B., a lawyer, conduct either in his own name or under some trade name or title a collection business, the following being assumed as the method of doing business:—Advertisements or cards are inserted in publications, and *letters sent to merchants, in which it is stated that the concern is engaged in a general collection business and solicits accounts for collection; solicitors are employed to visit merchants to solicit their collection business;* the clerks employed in the business are paid fixed salaries; all of the profits go to the attorney; and the latter attends to professional matters arising out of the business within his own territory; the concern sending to other attorneys practicing therein such matters as arise outside of A.B.'s territory.

Answer. No. This plan unites the practice of a profession with the conduct of a business which involves the solicitation of professional employment; the essential dignity of the profession requires that general solicitation of professional employment should be avoided.

(*b*) Does it make any difference in the answer if the matter underscored in the previous question is omitted from the hypothetical case?

Answer. Yes. There is no reason why the lawyer may not make a specialty of collections as a part of his professional activities; he should not however cloak his identity under a trade name or title; he should practice his profession either in his own name, or in association with some other lawyer or lawyers whose names may be used to identify the association. If his announcements are inserted in publications, they should conform to the provisions of Canon 27 of the American Bar Association, approved by the New York State Bar Association; that is, they should consist of a simple professional card, and he should not in any other way generally solicit professional employment.

II

E.F., a collection agency, receives a claim for collection. Following failure to collect without suit, it sends the claim to A.B., an attorney who performs legal services in connection therewith.

(*a*) May A.B. divide his fee with E.F.?

Answer. No. The division of professional fees with those not in the profession detracts from the essential dignity of the practitioner and his profession; and admits to its emoluments those who cannot lawfully perform its duties. If the legal services involve the bringing of suit, such a division appears to be prohibited by our Penal Law. (See S. 274.)

(*b*) May A.B. receive a salary from E.F., E.F. charging its patron for the entire service inclusive of the professional service, A.B. making no charge direct to the patron?

Answer. No. A lawyer may receive a salary from a collection agency for services rendered to that agency, but if the

lawyer render professional services to the patron of the agency the lawyer should make his charge directly to the patron, otherwise the agency would be determining the charge to be made for the lawyer's services and would be sharing in the lawyer's fee or making a profit on the lawyer's professional work.

(*c*) May A.B. charge for his own service a specific sum, which he retains wholly for himself, E.F. charging for its own service a specific sum which it retains wholly for itself, E.F. guaranteeing its patrons the faithful discharge of the duties of A.B., including payment over of all collections by A.B. for the patron?

Answer. The method of charging is unobjectionable, but it is derogatory to the essential dignity of the profession for a lawyer under such circumstances to permit another to guarantee expressly his honesty or efficiency.

(*d*) Does it alter the situation that all legal matters coming through E.F. are referred to A.B. within his territory?

Answer. No.

III

(*a*) May A.B. take a retainer from G.H., an organization of business men, to perform such legal services as G.H. may require as its attorney, and also to attend to such legal matters as the members of G.H. shall refer to A.B., G.H. urging and soliciting its members to place in A.B.'s hands for reference to A.B. all matters involving collection of accounts, or involving the representation of creditors in bankruptcy proceedings, upon the ground that by co-operation in the handling of debtors' affairs, members interested will profit?

Answer. We assume, of course, that the lawyer's retainer by the association leaves him free to follow his own conscience. The Committee sees no impropriety in the course suggested, provided that G.H. is a bona fide organization formed by its members for their own benefit, is not engaged in a regular business of collecting accounts of non-members for profit, and it is the actual interest of the organization which prompts its solicitation, and provided the plan is not merely a cover for the solicitation of business by the attorney. The practice of the solicitation of professional employment by a lawyer is to be condemned, no matter what device may be resorted to as a cover or cloak: indeed, the adoption by him of a cover or cloak to conceal what if openly done would be professionally improper, merely intensifies the impropriety, for it adds deception to what would otherwise be an undesirable breach of the essential dignity of the office.

(*b*) May A.B. divide with G.H. such fees in bankruptcy matters referred to him by G.H. as he may receive as attorney, either for petitioning creditors, receiver or trustee?

Answer. No. The Committee's views of the impropriety of such division of professional fees are expressed in answer II (*a*) above.

(*c*) May A.B. pay to G.H. in the situation referred to in subdivision (*b*) above for services rendered to him by G.H.?

Answer. The vice of such a payment for services is the temptation to make it a cloak for compensation for the solicitation of business for A.B., or a cloak for an unequal preference to the members of G.H. We would see no impropriety in a reasonable compensation to the association for services actually rendered if these two dangers were clearly eliminated in a particular case and the amount and mode of the payment were fully disclosed in the proceeding or settlement.

(*d*) May G.H. in matters in which it desires the co-operation of creditors, not members of G.H., circularize such creditors, urging them to place their claims with G.H. or A.B. in order that A.B. may conduct such legal proceedings as may be necessary, it being assumed that it is for the best interests of creditors that such proceedings should be conducted?

Answer. Upon the assumption that G.H. does this not for the purpose of engaging in a general practice, but solely in the special case for the purpose of protecting the interests of its members, it may be done; the Committee believes it would be preferable to have the proxies run to G.H. or an officer; if it be a device to enable A.B. to do indirectly what he could not properly do directly, it is to be condemned.

(*e*) Does it make any difference in the above situation whether A.B. performs the service for such non-members gratuitously or not?

Answer. If the interest of G.H. demands or justifies gratuitous services for non-members, or any other good reason in the opinion of A.B. so demands or justifies it, he is not required to charge for his services; but if it is a mere device to secure non-members as clients in other employment, it becomes a reward offered for employment, and therefore is to be condemned for reasons already assigned.

IV

(*a*) May E.F., an existing collection agency, where the co-operation of creditors other than regular patrons or subscribers of E.F. seems desirable, circularize such creditors, urging them to place their claims with E.F. or A.B. in order that A.B. may conduct such legal proceedings as may be necessary, it being assumed that it is for the best interests of creditors that such proceedings should be conducted?

Answer. It may be that the act of E.F. is the unlawful practice of law within the scope and reasoning of Matter of Co-operative Law Co., 198 N. Y. 479, Matter of Associated Lawyers Co. 134 A. D. 350, and Matter of the City of New York, 144 A. D. 107. The Committee expresses no opinion upon this question of law. If E.F.'s act be unlawful, the lawyer should not participate in any emolument resulting therefrom; but if it be lawful for E.F. to circularize creditors, "in order that A.B. may conduct legal proceedings," still it is unprofessional for A.B. to permit such solicitation of professional employment for him by E.F., since he cannot properly so solicit it for himself.

(*b*) May A.B. divide with E.F. such fees in bankruptcy matters referred to him by E.F. as he may receive as attorney either for petitioning creditors, receiver or trustee?

Answer. No: for the reasons already stated in II (*a*).

(*c*) May A.B. pay to E.F. in the situation referred to in IV (*a*) above for services rendered to him by E.F.?

Answer. No: in view of our answer to IV (*a*).

(*d*) Does it make any difference in the situation referred to in IV (*a*) above whether A.B. performs gratuitously or not the service for such creditors who are not regular patrons to E.F.?

Answer. No.

V

(*a*) May A.B., an attorney representing some clients, creditors in XYZ, a bankruptcy proceeding, send a general circular letter to all creditors, informing them of his representation of some creditors, and urging them to place their claims and proxies in his hands, for the reason that co-operation is in the best interests of the estate?

Answer. No. The co-operation which is desired among the creditors to prevent fraud or to secure an efficient administration is the concern of the clients, as to which the lawyer may properly advise them; but he should avoid doing directly or indirectly anything that savors of such solicitation of employment.

(*b*) May he do this if the circular letter, instead of dealing generally, asks that such claim be placed in his hands if the creditor is not otherwise represented?

Answer. No. This does not eliminate the objectionable element of solicitation.

(*c*) May he do either (*a*) or (*b*) if his sole motive is to insure the complete protection of his immediate clients' interests?

Answer. No. His motive is immaterial; as his client's interests demand protection, the client or some other agent of the client may seek the co-operation, always provided it is not a mere device to solicit employment for the attorney.

VI

(*a*) May A.B., an attorney, receive claims or proxies where such claims or proxies have been secured through circularization by a creditors' committee formed in XYZ, a bankruptcy proceeding?

Answer. We see no impropriety in the action suggested, provided the committee is not a cloak used by A.B. to procure employment.

(*b*) Does it make any difference that A.B.'s clients are the committee?

Answer. No: with the limitations already suggested.

(*c*) Does it make any difference that A.B. suggested the formation of the committee?

Answer. No: if the suggestion was in his clients' interest, and not as a cloak as already indicated.

(*d*) Does it make any difference that the proxies run to the members of the creditors' committee as attorneys in fact, A.B. appearing as counsel for the committee?

Answer. No. It appears preferable that the proxies should run as suggested because that course seems less liable to abuse as an objectionable cloak to solicitation of employment for the attorney.

VII

(*a*) May A.B. receive from C.D., a collection agency, claims in the XYZ bankruptcy proceedings, solicited by C.D., and appear as attorney in such bankruptcy proceedings acting under power of attorney for such claimants?

Answer. Yes. A lawyer should not be debarred from accepting professional employment from a collection agency. We have already indicated the abuses to be avoided, and to which a lawyer should not lend himself. See answers above to IV (*a*), (*b*), (*c*) and (*d*).

(*b*) May A.B. receive from C.D. claims in such bankruptcy proceedings, and appear as attorney for or act under power of attorney for such creditors, C.D. being specifically authorized by the claimant to select an attorney for him, and as his agent notifying A.B. that it delivers the claim acting as such agent?

Answer. In a case not obnoxious to the criticism suggested in IV (*a*) and (*b*) above, the relationship between the attorney and client is direct, and therefore we see no impropriety in A.B.'s acceptance of employment by the creditor.

VIII

(*a*) Is there any impropriety in an attorney permitting his name to be advertised as attorney or counsel in connection with a corporation's, bank's, trust company's, or re-organization or creditors' committee's announcement of its purposes by advertising in newspapers or circulars or upon its letter-heads?

Answer. No; provided the particular form of advertisement is not otherwise objectionable. It is obvious that the re-organization committee, the corporation, the bank or trust company may depend in part in its appeal for public confidence and business on the standing and reputation of its professional adviser; so also in the case of creditors' committees either in a re-organization plan or in the request for co-operation among creditors, the name of the attorney by whom the proceedings in aid of the creditors will be conducted is often the determining feature in the decision of the creditor as to whether or not he will co-operate. On the assumption, therefore, that the attorney is not the moving party in the advertisement of his name, we think it would be unreasonable to answer this question in the affirmative.

(*b*) Is there any impropriety in an attorney permitting his name to be announced as attorney or counsel for a trade organization or association upon its stationery?

Answer. No.

(*c*) Is there any impropriety in A.B., an attorney, permitting a trade organization for which he acts as attorney or counsel to solicit its members to consult A.B. upon such legal matters as require professional service, or to solicit the sending of claims for suit by members of the association to A.B.?

Answer. In general we consider such solicitation improper; where, however, the collective interests of the members of the association require co-operation, it is not improper.

(*d*) Is there any impropriety in A.B. permitting a collection agency, doing a general collection business including the solicitation of collections but not legal business, to print upon its stationery and in its advertisements "A.B. attorney" or "A.B. counsel"?

Answer. No.

IX

(*a*) May A. B., a lawyer, having a commercial law practice, pay a fee to M. N. O., a list made up of lawyers and in which collection agencies appear, for the privilege of having his name appear upon such lists?

Answer. Yes: provided the form of the announcement is not otherwise objectionable (see I (*b*)); provided also that the amount he pays to M. N. O. is not determined by the amount realized by A. B.

(*b*) Does it make any difference as to its professional propriety, that the list is used exclusively for and by lawyers, or is intended to be circulated also among laymen?

Answer. No.

(*c*) Does it make any difference as to its professional propriety, that the charge of the list varies according to the amount of business received by the lawyer through such a list?

Answer. Yes: since it necessarily involves a division of the lawyer's professional fees, in consideration of the securing of employment for him by the person with whom he divides his professional fees.

(*d*) Does it make any difference that the list in connection with its publication or circulation maintains a complaint department at its own expense, adjusting differences arising out of charges earned or claimed, and issues for each representative in the list a surety company bond guaranteeing the faithful performance of his duty?

Answer. Yes. It is derogatory to the essential dignity of the profession for a lawyer to seek employment by offering, or permitting another to offer, a bond to guarantee his honesty or efficiency.

(*e*) Does it make any difference as to professional propriety that the list is confined wholly to lawyers, but managed for

profit, and restricted in each town to such firms or individuals as are approved by the managers, assuming, also, that the managers in good faith seek only to put into the list competent and trustworthy lawyers, and make their decision only after careful investigation concerning the lawyer?

Answer. No.

THE BRITISH NAVAL PRIZE COURT.

THE very name of a Naval Prize Court suggests the atmosphere of a court-martial. Surely, there will at least be a sentry at the door. The hall itself, one anticipates, will be filled with officers in cocked hats and epaulettes, and the bench itself will be nothing more than a transplanted quarter-deck. There will, of course, be a succession of Jack Tar witnesses, characters from Marryat brought up to date, and who will tell thrilling stories of derringdo on the high seas.

Nothing of the sort. An ordinary London "bobby" is the only protection of the Court against intruders. The trial chamber is simply one of the lofty but ill-ventilated halls of the Royal Courts of Justice in the Strand. The gilt anchor hanging over the bench indicates that it is one of the rooms in which the Admiralty Court regularly sits. The only uniforms are the judicial robes and full wig of the President of the Court, Sir Samuel Evans, and the wigs and gowns of the barristers who occupy the front row of seats in the well of the court and overflow into the aisle. Among the barristers there are a few not often to be seen in these courts; notably, Dr. Thomas Erskine Holland, one of the chief living authorities on international law, whom the exceptional interest of the occasion has brought up from Oxford. And as for tales of adventure—why, a stranger who happened in casually might suppose he was listening to an action for tort, or some other Dodson-and-Fogg procedure. The prevailing atmosphere is neither of ozone nor of burnt powder, but of briefs and writs and affidavits.

There is a call of "Silence!" and the judge enters, preceded by the Admiralty Marshal bearing the emblem of a silver oar which has been carried in this procession whenever the Court has sat since 1586. Sir Samuel Evans is presently joined informally on the bench by Lord Mersey, no longer occupied with *Titanic* or *Empress of Ireland* inquiries, but spending a busman's holiday in sitting for a while as a privileged spectator in the Court over which he formerly presided.

From the center of the row of barristers rises the slim figure of the Attorney-General, Sir John Simon. He reminds his Lordship that this is the first time a British Prize Court has sat for sixty years. He then summarizes the history of such jurisdiction in the past, recalls how Lord Stowell presided over the Prize Court continously from 1798 to 1828, and, while he hopes that Sir Samuel Evans will sit to administer justice for an equally long period, hopes also that the present Prize Court will not have to remain in session for so many years.

The eloquent and learned leader of the English bar comments also on some of the changed conditions since the last court of the kind sat during the Crimean War. The almost universal substitution of other means of motion on the sea for the use of sails is one of them. Wireless telegraphy is another. (If at this point Sir John Simon were to glance at the Judge's hands instead of his face, he would discover that a few venerable traditions still remain, for his Lordship is making his notes with a quill!) He speaks, further, of changes that will inevitably affect the decisions of the present court, international agreements such as the Declaration of Paris and additions to the law of nations resulting from conventions entered into at The Hague.

The first actual case then comes up for consideration. It is that of the German bark *Chile,* from Bremen, which had the bad luck to find herself in the port of Cardiff when hostilities began. The next day she was seized by customs officers on behalf of the Crown. Sir John Simon briefly puts before the court the essential documents, as to registration, etc., showing that the *Chile* is undoubtedly an enemy merchant ship. He then enters into an interesting legal argument as to the proper order to make in such circumstances. Lord Mansfield is quoted to show that, "in the absence of a reciprocal arrangement between the countries at war," a ship so taken should be confiscated. But a Hague convention, to which both England and Germany are parties, agrees that such a ship should not be confiscated, but detained until the end of the war and then restored without compensation. Is Germany, however, acting up to her part of this convention, and thus making the "reciprocal" arrangement? There is no evidence that she is.

Meanwhile, the Attorney-General, speaking on behalf of the Crown, is anxious that England shall live up to her agreement both in the letter and the spirit. He, therefore, suggests that the order of the court shall be one of detention only, with liberty to apply again later if necessary.

When Sir John Simon sits down, having spoken for a full hour, there rises a brother lawyer, A. D. Bateson, K. C., appearing on behalf of the owners of the ship. "I am always pleased to hear you, Mr. Bateson," says the Judge, "but the owners are citizens of the German Empire, and has an enemy the right to appear in this court?" There follows an interesting dialogue on the point between Judge and counsel.

Mr. Bateson quotes precedents, and then puts this question: "Supposing—if for the purpose of my argument I might make such an incredible supposition—that your Lordship had been entirely misled by the Attorney-General as to what the law of nations was, and I was sitting here briefed for an alien enemy, could I not get up and say that the law of nations was not as stated by my learned friend?"

The Judge's reply is prompt and decisive. "You are putting your ground too high now. I am quite clear that an alien enemy has no right to come here and argue questions of international law."

The general upshot of the conversation seems to be that, in the Judge's opinion, an alien enemy can only appear if he is endeavoring to show that *pro hac vice* his hostile character is taken away. In the present case, however, Mr. Bateson is ruled out because his affidavit does not show any ground which entitles him to appear. On the general question, the Attorney-General, when invited to assist the court, promises to consult those who are authorities on the subject with a view to presenting his Lordship with a reasoned argument when a case arises in which a decision on the subject is required.

Another counsel, appearing for the Cardiff Railway Company, having raised the question of dock dues payable by the *Chile,* Sir Samuel Evans pronounces his judgment, prefacing it with some remarks suggested by Sir John Simon's historical résumé.

"In times past," he says, "and particularly during the years of the later part of the eighteenth century and the earlier part of the nineteenth century, the English Prize Courts pronounced decisions which commanded general confidence and received the admiration of all the countries interested in the law of nations. Our predecessors have set splendid examples and have created great traditions, and the Prize Court to-day will do its best,

without fear or favor, to follow those examples and uphold those traditions."

DECISION OF THE COURT.

The decision of the court is as follows: "I pronounce the said ship *Chile* to have belonged at the time of the seizure to enemies of the Crown, and to have been properly seized by the officers of the Crown, and on the application of the Crown I order that the ship be detained by the Marshal until a further order is issued by the court."

The second case is that of a sailing vessel, the *Perkeo*, captured off Dover by H. M. S. *Zulu*. She was formerly an English ship, but last July she was bought at New York by a Hamburg firm, and there has been found among her papers a document signed by the German Consul-General at New York certifying this purchase. Here the Attorney-General calls attention to article 3 of the Hague Convention, which provides that enemy ships which left their last port of departure before the outbreak of hostilities, as this vessel had done, may not be confiscated, but merely detained until the end of the war. But he adds that Germany has not agreed to article 3, and he therefore applies for the vessel's condemnation. This is at once granted by the judge, who orders the *Perkeo* to be appraised and sold.

Now that the general principles of the Court's procedure have been settled, its work proceeds briskly. By this time Sir John Simon—who is a Cabinet Minister as well as the leader of the bar, and has many duties to attend to in these strenuous days—has gone home, leaving the Crown to be represented by a junior counsel.

It takes on an average not more than five minutes to dispose of each of the remaining cases on the day's docket. In some instances the place of the capture is not mentioned in the affidavit, as it would be inexpedient for the position of the captor to be revealed.

The old practice of the British navy with regard to prize money, by the way, is to be modified during the present war. As the Attorney-General explained in his opening speech, the law has always been that a condemned prize goes to the Crown. The Crown, in its discretion, has been accustomed to distribute the proceeds among those immediately responsible for the capture. But, under modern conditions, it would be unfair that only those members of the sea force who took part in the capture should be considered. Some of the most important and gallant services in the navy are performed by men—the submarine service and the crews of Dreadnoughts, for example—who have no opportunity of taking part in the capture of prizes. Some modification of the earlier method of distribution will therefore now be introduced.

H. W. H. in New York *Evening Post*.

Cases of Interest.

WHAT CONSTITUTES A "COMMUNICATION" BY PATIENT TO PHYSICIAN WHICH THE LATTER MAY NOT TESTIFY TO.—Under a statute providing that a physician shall not testify as to a communication made to him by his patient, a "communication" may be, not only by word of mouth, but by exhibiting any part of the body thereof to the physician for his opinion. Ausdenmoore *v.* Holzback, (Ohio) 106 N. E. 41, wherein the court said: "We hold that a communication by the patient to the physician may be, not only by word of mouth, but also by exhibiting the body or any part thereof to the physician for his opinion, examination, or diagnosis, and that that sort of communication is quite as clearly within the statutes as a communication by word of mouth."

DEGRADED CHARACTER OF WITNESSES FOR STATE AS WARRANTING COURT IN CRIMINAL TRIAL PASSING ON THE EVIDENCE.—In People *v.* Eng Hing, N. Y., 106 N. E. 96, one of the questions arising on an appeal from a conviction of murder was whether the degraded character of the witnesses for the prosecution made the weight to be given their evidence a matter for the court. The Court of Appeals through Werner, J., said: "The answer to this suggestion is found in the very recent case of People *v.* Seidenshner, 210 N. Y. 358, 359, 104 N. E. 420, where Judge Chase had occasion to discuss for this court the character of witnesses by whose testimony the commission of the crime of murder was established. It was there very aptly pointed out that crimes are usually committed by those who are properly designated as criminals, and who consort with their own kind in surroundings where persons of undoubted veracity and responsibility are rarely found, and then only by chance. The moral of the discussion was that the value of such testimony is for the consideration of the jury quite as much as any other; and that when it is submitted under proper instructions it is conclusive upon this court, unless it is inherently improbable, or clearly against the weight of other more credible evidence."

PROOF OF GOOD CHARACTER OF OTHER ALLEGED PARTICIPANT IN ACTION OF ADULTERY.—The sound rule is laid down in Glover *v.* State, (Ga.) 82 S. E. 602, that since adultery is necessarily a joint offense, one on trial for that offense may introduce proof of the good character of the other alleged participant. The court said: "We are of course aware of the usual rule that the character of one accused of crime cannot be put in evidence by the state, and, unless he himself makes the issue, he cannot be attacked on account of such character. Also we have in mind the rule the Supreme Court of this state has laid down in Lewis *v.* State, 89 Ga. 396, 15 S. E. 489, that, in a trial for seduction, it is not competent for the state to show that the family of the female alleged to have been seduced were of good character and standing in the community or that even the character of the female herself was good, except in rebuttal of evidence tending to impeach her chastity or veracity. Nevertheless, while we find no definite authority in this state for the rule which we now announce, it seems to us to be good law that the accused should be permitted to prove, if he can do so, that the woman with whom he is charged with having had adulterous intercourse is one whose well-established character is such as to refute the charge."

RIGHT OF ABUTTING OWNER TO ENJOIN MAINTENANCE OF MASSIVE POLES USED FOR CARRYING HIGH TENSION ELECTRIC WIRES.—In New Jersey the Chancery Court has in two recent cases, namely Thropp *v.* Public Service Elec. Co., 91 Atl. 318, and Dalton *v.* Public Service Elec. Co., 91 Atl. 589, enjoined the maintenance of electric light poles on the highway in front of the premises of the complainant, it appearing that they were massive poles used for carrying high-tension wires for private lighting at a distance. In the former case the court said: "The power to light the streets includes the power to use the prevailing and approved methods of illuminating by electricity, and necessarily implies the right to employ the instruments required to effectuate the object of the grant; and when the privilege thus granted is exercised through the medium of another, as authorized, the right is automatically conferred on that other. . . . That poles and wires may be placed in the highway by a municipality for its public lighting, without the consent of abutting

owners, is settled by authority in this state. . . . The complainants do not pretend that they have sustained any injury which is not common to all abutting landowners, nor do they invoke any special equities in their favor; but, on the argument, resting their claim to relief in this respect exclusively upon the theory that the poles on their property, even for public lighting purposes, are an unlawful invasion of their property rights. Upon this aspect of the case they must fail. There is, however, another element in the case which they have vigorously pressed. They insist that the poles are very much larger than is required for the lighting of the highways of the township, and that the defendant's design in erecting poles of such great sustaining capacity as these have was to carry wires for private lighting and wires of a high-tension transmission system, the standard voltage of which is 13,200 volts. As to this, the proof is abundant. . . . An injunction will issue to remove the poles. Application may be made to have determined the size of poles to be substituted."

WEIGHT TO BE GIVEN JUDICIAL PRECEDENTS.—Judge Wanamaker of the Ohio Supreme Court in State *v.* Rose, (Ohio) 106 N. E. 50, commenting on the fact that in the case at hand there were numerous decisions sustaining the contention of the defendant, which contention, however, he refused to uphold, delivered the following pertinent remarks concerning case law. He said: "Numerous decisions can be cited to sustain the contention of the defendant as to his former jeopardy. Some of these decisions may be accounted for by a difference in the constitutional provisions, but more of them are accounted for by the fact that the courts have usurped the power of the lawmaker and the constitution maker and have added something to or subtracted something from the plain provisions of the laws and constitution. Case law is fast becoming the great bane of the bench and bar. Our old-time great thinkers and profound reasoners who conspicuously honored and distinguished our jurisprudence have been succeeded very largely by an industrious, painstaking, far-searching army of sleuths, of the type of Sherlock Holmes, hunting some precedent in some case, confidently assured that if the search be long enough and far enough some apparently parallel case may be found to justify even the most absurd and ridiculous contention. Case after case is piled, Ossa on Pelion, and about an equal number can be found on each side; then the court is expected to strike the balance and decide according to the preponderance of cases rather than the preponderance of reason and justice. Courts too frequently fall into the very common error of assuming to interpret everything in the line of legal language. The utter folly and wholesale abuse of construing words that need no construction and of interpreting language that needs no interpretation has led to much of the judicial confusion and most of the irreconcilable diversity of court decisions. There can be no stability about law until there be certainty about law, and when the constitution maker or statute maker uses a plain phrase, a simple sentence, and a workaday word, with a clear, simple, and unmistakable meaning, it is almost criminal in a court to scramble what is simple and confuse what is clear, under the mask of its right to construe."

LIABILITY OF HOSPITAL FOR NEGLIGENCE RESULTING IN DELIRIOUS PATIENT JUMPING FROM UNGUARDED WINDOW.—In Wetzel *v.* Omaha, etc., Hospital Ass'n, (Neb.) 148 N. W. 582, which was an action against a hospital, conducted for private gain, to recover damages for negligence in caring for a delirious patient whose death resulted from his jumping from an unprotected, unfastened, and unguarded window, in the absence of an attendant, the issue of negligence was held to be for the jury, where the evidence tended to show that he was knowingly admitted to the hospital under an implied obligation that he should receive such reasonable care and attention for his safety as his mental and physical condition required, and that the nurse in charge, at the time of the accident, had been absent for a period estimated by one witness to be less than five minutes and by another to be about an hour. The holding stated above was amplified by the court as follows: "A patient is generally admitted to a hospital, conducted for private gain, under an implied obligation that he shall receive such reasonable care and attention for his safety as his mental and physical condition, if known, may require. . . . Any other rule would be a reproach to the law and to hospital management. In the present case the evidence is sufficient to justify a finding that decedent was received under circumstances entitling him to the benefit of the principle stated. Duties which a hospital as such owes to a patient cannot be evaded by proof that the hospital nurse obeyed the instructions of the physician employed by him. Nurses necessarily have charge of delirious patients during the absence of physicians, while the responsibility of the hospital continues. In the present case the nurse knew that the patient was in danger from delirium. For his protection she had strapped him to his bed and the patient's physician had approved her act. A clinical record made by her shows that the patient was in a dazed condition a few hours before he left his bed. Under the circumstances, self-injury may well have been foreseen. The patient was left near a movable, unfastened, unprotected window sash in a room three stories above the pavement. He in fact committed an irrational act resulting in his death. It cannot be said as a matter of law that there was no proof of negligence on her part or on the part of her employer. A nurse's absence of five minutes may amount to negligence. . . . Under the circumstances of this case, as already outlined, the question of negligence was an issue of fact for the jury."

IMPROPER REMARKS OF COUNSEL AS GROUND FOR REVERSAL OF JUDGMENT.—A judgment for the plaintiff in an action to recover damages for personal injuries resulting from the collision of cars operated by the defendant was reversed in Becker *v.* Philadelphia Rapid Transit Co., (Pa.) 91 Atl. 861, on the following state of facts: At the trial there was no attempt to defend against the negligence charged, and the case was made to turn upon the extent of the injuries sustained. For this purpose medical testimony was introduced to show the extent and character of the injuries and how the plaintiff was affected thereby. The defendant called a physician who had examined the plaintiff, and this witness testified in detail as to her condition. There was nothing in his testimony to indicate that he was unfair in his statements or biased in his professional judgment. His testimony was straightforward, and no attempt was made to impeach his veracity. This was the situation at the close of the testimony when counsel proceeded to argue the case to the jury. In his argument counsel for plaintiffs severely criticised the testimony of the physician called by defendant, saying, among other things: "Will you believe the testimony of the physician for the transit company, whose business it is to minimize injuries?" At this point counsel for the defendant called the attention of the court to the remarks complained of and moved for the withdrawal of a juror; whereupon counsel for plaintiff said: "I stand upon that." The motion was overruled and the case proceeded. This improper remark of counsel was made the subject of the first assignment of error. The Supreme Court said: "If standing alone we might hesitate to reverse on this ground, but taken in connection with other matters complained of, we feel it to be our duty to admonish counsel that remarks of this character in making appeals to juries are highly improper and

counsel making them do so at their peril. In recent years we have had occasion in several cases to remind counsel of the impropriety of making such appeals to the prejudice and sympathy of the jury. . . . This rule will not be relaxed, but will be enforced. As was said by the present Chief Justice in Saxton *v.* Ry. Co., above cited: 'If courts are to continue to be places where justice is judicially administered, causes must be fairly presented and fairly defended, and the duty of counsel in this regard is not less important nor less imperative than that of the judge.' Remarks of counsel not warranted by the evidence are always improper, and especially so when the attempt is made to unfairly prejudice the minds of jurors."

FARMING A "TRADE" WITHIN THE MEANING OF STATUTE RELATING TO SLANDER.—One conducting a general farming business is held included in a proper interpretation of a Georgia statute declaring that slander may consist in charges made in regard to another "in reference to his trade, office, or profession, calculated to injure him therein." The case wherein this holding appears is Spence *v.* Johnson, 82 S. E. 646. The reasoning of the court is in part as follows: "The determination of the case . . . rests upon the inquiry whether the petition set out charges made against the plaintiff 'in reference to his trade,' calculated to injure him therein. It was contended that farming was not a trade within the meaning of the Code section above set out. This section did not arise from a legislative act, but was a codification of the common law. It is therefore permissible to consider the meanings which have been given to the word 'trade,' in order to determine in what sense it was employed by the codifiers, and by the legislature in adopting the Code. If the etymology of the word 'trade' be considered, it originally meant a track of course, and this meaning still survives in the word 'trade wind.' Hence it came to mean a way of life, business, or occupation, and specially a handicraft by which one earns a livelihood, or a mercantile business, as opposed to the liberal arts or professions. A still further development makes the word synonymous with commerce. . . . In the case before us it was alleged that the plaintiff was a farmer, conducting and carrying on a general farming business; that the defendant falsely and maliciously stated in the hearing of others, 'of and concerning the said plaintiff, and of and concerning him in his trade and business,' certain things, among them being that the plaintiff was of no account, that he would not do what he said he would do, that he made a contract with a named person to sell his (plaintiff's) cotton seed, and to deliver them in the fall, and that 'when he brought the cotton seed to town he was slipping them off,' and did not deliver them to the purchaser, and would not pay 'the money' (meaning the money advanced by the purchaser to the plaintiff on account of his cotton seed). As against a demurrer, these allegations are sufficient to show that the words were used concerning the plaintiff in reference to his 'trade' or business. It is a matter of common knowledge that credit and good reputation are important, if not essential, to one who conducts a general farming business. To charge him with being of 'no account,' and not doing what he promised, and with trickery in disposing of his products and retaining money advanced, is calculated to injure him in his 'trade' or business. Some of the charges alleged to have been made were of that character, and were expressly alleged to have been falsely and maliciously made of the plaintiff in his trade and business. It was accordingly erroneous to dismiss the petition on demurrer."

ADMISSIBILITY IN EVIDENCE OF SUBSEQUENT ACTS OF SEXUAL INTERCOURSE IN ACTIONS OF STATUTORY RAPE.—The New York Court of Appeals in People *v.* Thompson, 106 N. E. 78, has decided for the first time the question whether in actions of statutory rape and kindred crimes evidence is admissible of subsequent acts of sexual intercourse. Collin, J., in a well reasoned opinion considers the question as follows: "The judicial decisions are not . . . in harmony in determining the question whether or not illicit acts subsequent to that charged are relevant and admissible in cases of the character above mentioned. While this court has not directly considered it, courts of the state have answered it in the negative. . . . In People *v.* Freeman, 25 App. Div. 583, 50 N. Y. Supp. 984, affirmed 156 N. Y. 694, 50 N. E. 1120, on the opinion below, the defendant was convicted of the statutory crime of rape in the second degree, committed on January 13, 1894. Evidence of acts of a similar character between the same parties intermediate May 9 and June 11, 1894, was admitted against the objection and exception of defendant. There was no proof of familiarity or association between them within the period from January 13 to May 9, 1894. It was held that, giving full effect to the principle that subsequent acts of a similar character may show the adulterous disposition of the parties and corroborate the proof that the specific act charged was committed, the subsequent acts testified to had not such connection with or relation to the antecedent act as to show a mutually amorous disposition between the parties on January 13, 1894, the court saying: 'Doubtless the extent to which such testimony may be admitted must, in a large measure, be determined by the trial judge in the exercise of a sound discretion. But there are bounds to his discretion. The evidence offered must at least have a legitimate tendency to show a lewd or adulterous disposition between the parties at or about the time when the offense is laid in the indictment.' 25 App. Div. 589, 50 N. Y. Supp. 987. The reasoning of the Freeman case is sound and salutary. The preponderance of judicial opinion now is that acts subsequent to the act charged in the indictment (as well as those prior to it) reasonably indicating a continuity of the lascivious disposition, are relevant, subject, however, to the rule that when the admissibility of evidence depends upon collateral facts, the regular course is for the trial judge to pass upon the fact in the first instance, and then, if he admits the evidence, to instruct the jury as to its purpose and effect, and to exclude it if they should be of a different opinion on the preliminary matter. The question for the jury throughout the trial is, Is the defendant guilty of the specific offense charged in the indictment? But, when that offense involves illicit sexual intercourse by consent, subsequent offenses of like character between the parties may be relevant, because the extreme intimacy and the amorous inclination and willingness evidenced by its commission are a growth preceding the offense, and are rather nourished than annihilated by their exercise. They do not suddenly arise and are not likely to suddenly disappear; hence it is that their indulgence prior or subsequent to the specific occasion charged may tend to increase and strengthen the proof as to that occasion. The acts offered as corroborative may be so remote as to be irrelevant. Remoteness, however, does not necessarily result from mere lapse of time, which is not necessarily an element of it. Its essence is such a want of open and visible connection between the evidentiary and the principal facts that, all things considered, the former are not worthy or safe to be admitted in proof of the latter." The holding of the New York court is in line with a late decision in Ohio, namely, State *v.* Reineke, 106 N. E. 52.

"If the government will not keep its faith, little better can be expected from the citizens." Field, J., dissenting. Sinking-Fund Cases, 99 U. S. 767.

News of the Profession.

RESIGNATION OF TEXAS JUDGE.—Special District Judge M. Nagle, of El Paso, Tex., has resigned from the bench.

RETURNS TO WASHINGTON.—Judge Arthur D. Thompson, of the Nicaraguan Mixed Claims Commission, has returned to Washington, D. C.

MUNICIPAL JUDGE APPOINTED.—C. M. Campbell has been appointed municipal judge at Tracy, Minn., by Governor A. O. Eberhart. He succeeds H. M. Algyer, resigned.

APPOINTED DISTRICT JUDGE.—Governor Ammons has named Jesse C. Wiley of Del Norte as judge of the Twelfth Judicial District of Colorado to succeed the late Judge Holbrook.

DISTRICT OF COLUMBIA JUDGE RESIGNS.—Daniel Thew Wright, Associate Justice of the Supreme Court of the District of Columbia, has sent his resignation to President Wilson, to take effect November 15.

APPOINTED TO APPELLATE BENCH.—The Supreme Court of Illinois has appointed John M. Niehaus of Peoria, judge of the Ninth Circuit, to the bench of the Appellate Court of the Second District.

MADE ASSISTANT U. S. ATTORNEY.—Benjamin Leland White, of Marceline, Mo., has been appointed Assistant United States District Attorney for the Eastern District of Missouri, succeeding Charles Daues.

APPOINTED TO BENCH IN ILLINOIS.—Governor Dunne has appointed Claire C. Edwards of Waukegan as circuit judge of the Seventeenth Judicial District of Illinois to succeed Judge Charles Whitney, deceased.

WOMAN NAMED U. S. ASSISTANT ATTORNEY.—Mrs. Annette Abbott Adams has been appointed Assistant United States Attorney at San Francisco. She is the first woman in the United States to occupy such a position.

DEATH OF WISCONSIN JUDGE.—Norman S. Gilson, for eighteen years judge of the Circuit Court of Wisconsin and for twelve years a member of the state tax commission, died at Fond du Lac, Wis., on September 21, aged 75.

CIRCUIT JUDGE IN KENTUCKY APPOINTED.—Charles T. Ray of Frankfort has been appointed by Governor McCreary of Kentucky to the bench of the Jefferson Circuit Court, Common Pleas Division, to fill the vacancy caused by the death of Judge William Smith.

NEW FEDERAL JUDGE.—Judge Bledsoe, of the Superior Court of San Bernardino county, Cal., has been appointed Federal Judge by President Wilson, the judicial position created by the bill providing for an additional judge for the Federal Court of the Southern District of California.

MEMORIAL FOR JUSTICE LURTON.—Memorial services for the late Justice Lurton of the United States Supreme Court were held at Cincinnati, O., on October 6. A notable array of federal and state judges and leading members of the bar of the Sixth United States Judicial Circuit participated.

MASSACHUSETTS BAR ASSOCIATION.—The annual meeting of the Massachusetts Bar Association was held at Worcester, Mass., on October 9 and 10. The speakers were Hon. Arthur P. Rugg, chief justice of the Massachusetts Supreme Court; Attorney General Thomas J. Boynton; and Hon. Roscoe Pound.

IDAHO JURIST DIES.—George H. Stewart, Chief Justice of the Idaho Supreme Court, died at Portland, Ore., on September 25, aged 57. Judge Stewart served two terms as prosecuting attorney of Frontier county, Neb. From 1897 to 1907 he was District Judge of the Third Judicial District of Idaho. In 1907 he became an Associate Justice of the Supreme Court of the State, and served as such until 1913, when he became Chief Justice.

NEW CORPORATION COUNSEL OF CHICAGO.—John W. Beckwith has been appointed corporation counsel of Chicago by Mayor Harrison. He succeeds William H. Sexton, who resigned to resume the private practice of law. Mr. Beckwith has been first assistant corporation counsel since Maclay Hoyne resigned after his election to the state's attorneyship. Bryan Y. Craig will be promoted to the position of first assistant, while Leon Hornstein will become second assistant.

NORTH DAKOTA STATE BAR ASSOCIATION.—The annual meeting of the North Dakota State Bar Association was held at Grand Forks on September 17 and 18. The President's address was delivered by Judge John Knauf of Jamestown. The programme also included the following addresses: "The Primary Election Law," by Dean W. R. Vance of the University of Minnesota Law School; "Corporations and Express Trusts," by Prof. H. L. Wilgus of the University of Michigan Law School; "The Three Revolutions," by F. L. McVey; and "The Juvenile Court in North Dakota," by Judge C. W. Buttz. The following officers were re-elected for the ensuing year: President—John Knauf, Jamestown; vice-president—B. W. Shaw, Mandan; secretary and treasurer—Oscar J. Seller.

AMERICAN BAR ASSOCIATION.—The annual meeting of the American Bar Association was held at Washington, D. C., on October 20, 21 and 22. The official programme was in part as follows: Opening address by the President of the United States; president's address by Hon. William Howard Taft; address by United States Senator Elihu Root; address on "The Constitution of Canada," by the Right Honorable Sir Charles Fitzpatrick, Chief Justice of the Dominion of Canada; address on "The Argentine Constitutional Ideas," by the Right Honorable Romulo S. Naón, Ambassador from the Argentine Republic to the United States; annual dinner of the association, President Taft presiding. The following affiliated bodies were scheduled to meet on the dates mentioned: Commissioners on Uniform State Laws, on October 14; Maritime Law Association of the United States, on October 19; Judicial Section, on October 20; Comparative Law Bureau, on October 20; Section of Patent, Trade Mark and Copyright Law, on October 20; Section of Legal Education, on October 19, 20 and 22; American Institute of Criminal Law and Criminology, on October 23. Notice of the election of officers will be made in the next issue of LAW NOTES.

MISSOURI BAR ASSOCIATION.—The thirty-second annual meeting of the Missouri Bar Association was held at St. Louis on September 22, 23 and 24. President Edward J. White of Kansas City delivered an address on "Reform of Judicial Procedure." Other addresses were as follows: "The Dilemma of the Advocate of Judicial Recall," by Rome G. Brown of Minneapolis; "The Bench and Bar of the Platte Purchase," by H. C. McDougal of Kansas City; "Reminiscences of Some Deceased Lawyers of Central Missouri," by John F. Phillips of Kansas City; "The Evolution of the Independence of the Judiciary," by Hampton L. Carson of Philadelphia; "The Law's Delays," by Chief Justice Henry Lamm of Sedalia; "The Will of the People," by

Martin W. Littleton of New York; and a review of more than fifty years' experience at the bar and on the bench by United States District Judge D. P. Dyer of St. Louis. Chief Justice Henry Lamm of the Missouri Supreme Court was elected President of the association for the ensuing year.

English Notes.

THE COURTS AND THE WAR.—It is obvious that if the courts, the inferior as well as the higher tribunals, which sit to hear cases at first instance are to be continued in their usual routine during the war, they will either suffer a period of comparative idleness, caused by the absence of parties and necessary witnesses by reason of their being on active service or for other reasons, or some measure will have to be introduced by the legislature to alter the existing rules of evidence. The practitioner will easily imagine a number of cases in which, by reason of the absence of a person who is required to give evidence for the purposes of some purely technical point of proof, the parties cannot proceed with their action. Some of these cases may possibly be met by the courts allowing proof of the necessary facts to be made by presumptions which they will consider to have arisen from the state of affairs. This form of proof cannot, however, be too widely extended, and instances come easily to mind of cases where a party to a suit will necessarily be defeated because the state of war and its attendant consequences have destroyed what were otherwise his available means of proof. Some of these hardships can be removed only by legislation. The lawyer will await with interest the outcome of this state of affairs.

DEATH OF LORD O'BRIEN.—Lord O'Brien, for nearly twenty-five years, from 1889, Lord Chief Justice of Ireland, died on September 7 at Airfield, Stillorgan, county Dublin, aged seventy-two. Peter O'Brien, first Lord O'Brien of Kilfenora, was the fifth son of Mr. John O'Brien, M. P., of Elmvale and Ballynalacken, county Clare, and he was educated at Trinity College, Dublin. He was called to the Irish bar in 1865, and for some time acted as registrar to his uncle, Mr. Justice O'Brien. After joining the Munster Circuit he rapidly acquired a practice at the assizes and at Nisi Prius. He took silk in 1880, and he was rapidly promoted afterwards. He was appointed in 1881 Junior Crown Counsel at Green street, and on the elevation of Mr. Justice Murphy to the bench in 1882 Senior Crown Counsel. In 1884 he became a Bencher of the King's-inns, and in the same year Third Sergeant, being made Second Sergeant in 1885. During this period Mr. O'Brien took part in many of the most important prosecutions originating under Lord Spencer's administration in the warfare against law and order waged by the Land League. In 1887 he became Solicitor General; in the following year he was promoted to be Attorney General, and in 1889 he became Lord Chief Justice of Ireland on the acceptance by Lord Morris of a Lordship of Appeal in Ordinary. In 1891 the Lord Chief Justice was created a baronet, and in 1900 he was raised to the peerage.

SPREADING FALSE NEWS.—The wideness of the powers given to the government under the recently enacted Defence of the Realm Act is shown by the terms of a royal proclamation prohibiting the "spreading by words of mouth or in writing reports likely to cause disaffection or alarm." The necessity for such a measure, says the *Law Times*, from the point of view of the authorities responsible for the maintenance of public order, is obvious. It is somewhat doubtful whether such a measure was necessary from the lawyer's point of view, inasmuch as several authorities go to show that it is a misdemeanor at common law to fabricate and publish false news likely to produce any public detriment. Probably the first dictum to this effect was given in the seventeenth century by Chief Justice Scroggs, but the weight of his authority would be questioned nowadays, as he was of opinion that it was an offense to publish any news, however true or harmless it might be. In the year 1814 a conspiracy to publish a false rumor as to the death of Napoleon Buonaparte was held to be an indictable offense, but the decision of the court was founded on the fact that there was an illegal conspiracy. Certain departments of the government have come in for criticism lately with regard to their methods of dealing with news of our troops at the front. Whether such criticisms are well directed or not, the mischief that might arise from the unchecked publication or spreading of ill-founded rumors can easily be conceived, and the terms of the proclamation are therefore well-timed.

THE STATUTE OF LIMITATIONS AND ALIEN ENEMIES.—One of the few points of international law on which there seems to be universal agreement is that an alien enemy cannot sue or be sued during wartime. In the case of contracts entered into before the outbreak, however, the right of action is merely suspended and revives when peace is declared. This lapse of time would result, in the ordinary course, in certain contracts being barred by the statute of limitations, and the important question arises: Does the statute continue to run when a plaintiff is deprived of his right of action by reason of the war? The American courts answer this question in the negative, Hanger *v.* Abbott, 1867, 6 Wallace 532, holding that the statute is suspended during the period of the war. But it is open to doubt whether this is the view of English lawyers. In De Wahl *v.* Braune, 1856, 1 H. & N. 178, a married woman during the Crimean War sued on a contract whilst her husband was domiciled in America. Baron Bramwell, after holding that the husband must be joined as plaintiff, said: "It may be that the effect would ultimately be to bar the action by reason of the statute of limitations, but the inconvenient operation of that statute is no answer, and does not take the case out of the general rule." These remarks are *obiter dicta* only, but it is noticeable that many text-writers take the same view: Anson on Contracts, p. 120; Lindley on Companies, vol. 1, p. 53; Pollock on Contracts, p. 92. These learned authorities state that the right of an alien enemy to sue revives after the war has ceased, "unless meanwhile the right of action has been barred by the statute of limitations." There is no English case directly dealing with the point, but the American view seems the more rational of the two, and it is very possible that it would now prevail in England.

DUM-DUM BULLETS.—According to a message from Washington, the Kaiser charges the Allies with having used dum-dum bullets, while M. Poincaré, the President of the French Republic, in a telegram to President Wilson, while repudiating the allegation that dum-dum bullets are manufactured in French state workshops and are used by the soldiers, says: "The calumny is nothing but an audacious attempt to subvert the rôles. Germany has since the beginning of the war employed dum-dum bullets." On the ground that all unnecessary cruelty is barbarity, the Brussels Project prohibited the use of all arms, projectiles, and substances which cause unnecessary suffering. It was argued at Petrograd in 1868 that no projectile should be used on land or sea of less than 400 grammes (or 14 oz. in weight) charged

either with fulminating or inflammable material. At The Hague it was declared that "the contracting parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions." It was understood that this was aimed at the dum-dum bullets, which were originally manufactured at Dum-Dum, in India, for the use of the British army, claimed on the Continent to be cruel, and in England defended as humane. The British and American delegates did not sign this declaration, because amongst other reasons it forbids a particular specification in bullets instead of establishing a general principle. Very early, however, in the Boer War an undertaking was given in the House of Commons by the Secretary of State for War that dum-dum bullets would not be used by the British army during the hostilities. In 1907 Great Britain and Portugal intimated their accession to the declaration, and of the larger powers the United States only has not assented to it, though willing to agree to the proposition of bullets inflicting unnecessarily cruel wounds or exceeding the limit necessary for placing a man *hors de combat.—Law Times.*

Obiter Dicta.

MAKING SOUP.—Cook *v.* Mock, 40 Kan. 472.

ANOTHER DEAD GRANDMOTHER.—Steel *v.* Holladay, 20 Oregon, 70.

EQUITY'S CHILDREN.—"Trusts are children of equity; and in a court of equity they are at home—under the family roof-tree, and around the hearth of their ancestor." Per Bleckley, J., in Kupferman *v.* McGehee, 63 Ga. 256.

A FEW CHIMES.—Bell *v.* Warn, 4 Hun 406; Bell *v.* Chapell, 2 T. B. Mon. (Ky.) 151; Bell *v.* Clapp, 10 Johns. (N. Y.) 263; Bell *v.* Clarion, 113 Iowa 126; Bell *v.* Coffin, 51 Kan. 684; Bell *v.* Pleasant, 145 Cal. 410; Bell *v.* Twilight, 17 N. H. 528.

DISABILITY IN OREGON.—J. B. Ofner is chairman of a committee of the Oregon State Bar Association appointed to compile a list of oddities and errors in the Oregon code. He finds, *inter alia*, that the statute of limitations does not run against female persons who are under age, crazy, or married.

UNUSUAL JUDICIAL CANDOR.—"I have given this case more than ordinary care and attention, and I did so in the hope that I could discover some principle or method under the law by which her grievances might be redressed, and I am sorry I did not succeed."—Per Meagher, J., in Archibald *v.* Archibald, 40 Nova Scotia 406.

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WESTERN WIT.—Charles J. Schnabel and Judge Thomas O'Day of Portland, Ore., are close personal friends, but Mr. Schnabel nevertheless sprung this one on the judge in the trial of a case recently at Chehalis, Wash. "According to the old English common law," said Mr. Schnabel, "it takes no less than three men to constitute a riot. My rotund friend, Thomas O'Day, is the only living exception to that rule."

"IF AT FIRST YOU DON'T SUCCEED."—In Stevens *v.* Wooderson, 38 Ind. App. 617, the domestic history of one Thomas P. Wooderson is described by the court in the following picturesque language: "The evidence discloses that from 1882 to 1894, so far as Wooderson was concerned, the matrimonial bureau was in perfect working order, and that during those years the divorce machine was working with faithful regularity, except that sometime between 1885 and 1888 it failed to register, and again in 1894, when it seems to have registered late." It appears from a further examination of the case that Wooderson was six times married, four times divorced, and once separated.

DRUNKENNESS AND THE LAW OF NEGLIGENCE.—"Drunkenness excuses neither a crime nor a negligent act. So much is clear law. But at root a drunken man is as much entitled to life or limb as a sober man. In no system of ethics known to us has A any more right to negligently injure B when drunk than he would have to injure him when sober. Drunk or sober a man is a man and a brother in the law of negligence. Would it not be a droll and anxious enlargement of the charter powers of defendant corporation to so write the law as to allow it to cut off the life or leg of a toper by its negligent failure to use ordinary care towards him, and at one and the same time so write the law that under like circumstances it would be liable as a tortfeasor if he were sober? We take it that in right reason the drunkard is dealt with as if sober—no more, no less. He is held up on his part to the same high-water mark of duty and responsibility—so are those who deal with him. The woeful list of sorrows and ills flowing from drunkenness is long enough and sad enough without adding new terrors by judicial construction. Therefore, the operatives of engines and cars, who see (or where, in instances the duty is raised to look, they might see) a person fast in a cattle guard, or in a hole, or otherwise snared on a track, or down drunk, or otherwise apparently incapable of moving, are guilty of negligence in not making all prudent efforts to avoid a collision, and this regardless of such person's disability."—See Murphy *v.* Wabash R. Co., 228 Mo. 82.

EXPRESS OR IMPLIED?—We are in receipt of a verbatim copy of a decision recently rendered by a Justice of the Peace in Pennsylvania. The much-mooted question whether the "case was express or implied" does not seem to be settled very satisfactorily, for the learned jurist in effect dodges the issue by splitting the difference. Says His Honor:

In reviewing the case of J. A. Marshall *v.* North Hand & Co., I have listened very attentively to the evidence, and to the very able arguments from the learned counsel on both sides, to find whether this case was express or implied.

1st. Now, if implied, would defendant be actuated by rumor to go to plaintiff and hire a horse to do all his grocery work, for a period of forty (40) days, with no understanding as to the conditions of said hire.

2nd. If express, then why did the defendant retain possession of the horse of said plaintiff, for a period of thirty-five (35) days or over, after his or their horse were able to work, unless from a mercenary standpoint.

3rd. At no point of the evidence did the defendant show that he or they at any time were ever able to hire a horse for its feed prior to this one.

4th. There is a possibility of a word being dropped between defendant and plaintiff about the feed or care of said horse; that through the hallucination of rumor by defendant that he was impressed that the contract was express under these conditions.

Now as to the plaintiff:

1st. Would it be reasonable to assume that this man had a young valuable horse standing in the barn with no work to do, which was a drain on his resources, as it took about 50c per day to feed it, and by securing an implied contract indefinitely, he would be able to collect the sum of 50c per day on the return of said horse.

2nd. That all through evidence of plaintiff's witnesses, he did show that he at divers times did hire his horse from an implied contract, and always collected 50c per day on its return.

3rd. But it would appear that the plaintiff should have called for his horse or money before a period of forty (40) days or over.

However, in reviewing the case over, it would not be reasonable to think that plaintiff could afford to give out his horse just for its feed; nor is it reasonable to think that the defendant would ask to have a horse to do their work for such a period without paying for it.

Therefore, in view of all these facts, and with all respect for the honesty and reputation of both plaintiff and defendant; and to prevent such improvident contracts from taking place between them or others in time to come, I therefore render judgment in favor of the plaintiff, in half the sum sued for Ten and 75/100 ($10.75) Dollars, and all costs in the case.

_____ _____,

Justice of the Peace.

IN RE CONTRADICTING ONE'S WIFE.—The members of the Mississippi Supreme Court have been engaged in a friendly controversy lately respecting the advisability of a man's contradicting his wife. All the judges are apparently agreed that as a general rule it should not be done. At least one judge, however, believes that circumstances may arise under which discretion is not the better part of valor. The occasion of the controversy was the case of Riley *v.* State, 65 So. 882, a prosecution for murder. The trial court admitted evidence to the effect that the defendant's wife had accused him of the murder and he had not denied it. On appeal from a conviction, a majority of the court, speaking through Cook, J., said: "It is not always conducive to domestic peace for a husband to contradict the statements of his wife, and ordinarily the wise husband attempts to soothe and placate his irate spouse, rather than to question her statements, however wide of the truth they may be. A few husbands are brave and foolhardy, and at all hazards risk the consequences; but the law does not fix rules for the guidance of the superman, but all rules are adopted for the average. Of course, a judge far away from 'the firing line' incurs no immediate danger by lining up with the superman, but we who are fashioned in the average mold shrink from even that form of bravado. Speaking for the average man, we are of opinion that appellant was not called upon to deny the statement of his wife, made under the circumstances surrounding them at the time. His failure to deny, dispute, or hedge meets with our idea of what a normally prudent and sensible man would naturally have done, and therefore the evidence had no probative value, but was probably very damaging to him with the jury." Reed, J., dissenting, said: "I note with much interest the statement in the majority opinion that the wise husband will refrain from contradicting his wife and endeavor to soothe and placate her ruffled temper, rather than to question her words, even though wide of the truth, and that few are so brave or so foolhardy as to chance the consequence of the contrary conduct. Such a husband is classed in the opinion as the 'average man,' and the writer tells us that the majority of this court who are deciding this case are fashioned in the same mold; that they are unlike the judge who stands afar from the 'firing line,' thinking he is in no immediate danger, and dares to say that a defendant, when charged with the unlawful taking of a human life by his wife, should deny the charge. I will not dispute what is so earnestly declared to be the proper course for a wise husband, in his temperate dealings with his irate spouse. Undoubtedly discreet conduct and soft words are advisable in such a situation. I bow with respectful deference to the experience and good judgment of the majority as to all these matters conjugal. However, I do not think that this wise policy, which my brethren advise the good husband to follow, should be permitted to interfere with, and in truth interrupt completely, the operation of the rule touching the admissibility of the overheard conversation in this case. . . . Appellant may not have failed to reply to his wife's accusation because of his fear of her, as suggested by the reasoning in the majority opinion. He may not come up to the standard of 'the average man' as a husband. It may be that he did not have the good judgment of such husband in deferring to his wife, recognizing her superiority, or, if you please, her majority vote in all matters domestic. Perhaps their manner of life was not conducive of the finer feelings which move the average man to bow obediently to his spouse. This may readily be believed when we notice their living place and surroundings; for it is in evidence that the room of moderate size, in which the murder was committed, contained three beds and was occupied by seven persons, one of whom was a man so drunk as to need the services of a physician. . . . This couple, in the quiet of the night, alone as they doubtless believed, with the common knowledge of the crime, conversed with each other concerning their guilt. There was probative value in what they said, the degree of which the jury could determine."

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Sworn to and subscribed before me this 22nd day of Sept., 1914. George Babcock, Notary Public [SEAL]. Suffolk County, N. Y. (My commission expires March 30, 1915.)

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Lawyers as Lawmakers.

IN his recent book "Social Forces in England and America" H. G. Wells attempts to diagnose the "disease of parliaments." He finds that one of the causes for the legal muddles in which all democratic countries find themselves is the undue preponderance of legal talent in legislatures. Similarly Price Collier in his "England and the English" gives the House of Lords credit for greater sagacity than the House of Commons because it contains so few politicians and lawyers and so many practical men. Again, in 1803 Thomas Jefferson, then President of the United States, wrote this: "I served with General Washington in the Legislature of Virginia, before the Revolution, and, during it, with Doctor B. Franklin in Congress. And I never heard either of these men speak ten minutes at a time, nor to any but the main point, which was to decide the question. They laid their shoulders to the great points, knowing that the little ones would follow of themselves. If the present Congress errs in too much talking, how can it be otherwise in a body to which the people send one hundred and fifty lawyers, whose trade it is to question everything, yield nothing, and talk by the hour?"

Now, to say that lawyers do not make good legislators seems like stating a paradox. In the matter of framing laws it would seem that their very profession should enable them to qualify as experts. And, if we may be permitted to dogmatize, we make bold to say that good lawyers do make good lawmakers. If legislation suffers at the hands of the bar may it not be due to the fact that the bar is so largely represented in our lawmaking bodies by men who are primarily politicians? From time immemorial the law has been the principal gateway to political life. Many have taken up the law solely to further their political ambitions, and many more who have made it vocational have heard the siren call to the hustings before they have become comfortably adjusted to the legal harness. And so our legislatures have become choked with the tyros of the legal profession, whose knowledge of the law, if not superficial, has certainly not been profound. The activities of the great majority of these have been shaped and controlled rather by political expediency than by considerations of public weal. To such a body of men we naturally should look for constructive legislation with less confidence than to lawyers with the trained minds, wide knowledge, and matured judgment that long years of the study and practice of the law are apt to bring. Of course these able lawyers are not easily to be secured for legislative work, under present conditions in the public service. And there's the rub. But the point is that if we could and did get them for that service, their preponderance in legislative assemblies would not be an element of weakness in our political machinery.

Meeting of the American Bar Association.

SEVERAL notable addresses were delivered at the recent meeting of the American Bar Association at Washington, D. C. In his address of welcome to the association, President Wilson pleaded for the "humanizing of the law" by the incorporation of more justice into cases and fewer citations. The present unsettled world conditions, he said, made an opportune time for freeing the law from the dry consideration of cold precedent and injecting into it more of the viewpoint of justice of the ordinary man. "The opinion of the world," said President Wilson, "is the mistress of the world, and the processes of international law are the slow processes by which opinion works its will. What impresses me is the constant thought that that is the tribunal at the bar of which we all sit. I would call your attention, incidentally, to the circumstance that it does not observe the ordinary rules of evidence, which has sometimes suggested to me that the ordinary rules of evidence had shown some signs of growing antique. Everything, rumor included, is heard in this court, and the standard of judgment is not with regard to the character of the testimony but the character of the witness. The motives are disclosed, the purposes are conjectured, and that opinion is finally accepted which seems to be not the best founded in law, perhaps, but the best founded in integrity of character and of morals. That is the process which is slowly working its will upon the world, and what we should be watchful of is not so much jealous interests as sound principles of action. The disinterested course is always the biggest course to pursue. If you can establish your character you can establish your credit. What I wanted to suggest to this association, in bidding them very hearty welcome to the city, is whether we sufficiently apply those same ideas to the body of municipal law which we seek to administer. Citations seem to play so much larger rôle now than principle. There was a time when the thoughtful eye of the judge rested upon the changes of social circumstances and almost palpably saw the law arise out of human life. Have we got to a time when the only way to change law is by statute? The changing of law by statute seems to me like mending a garment with a patch, whereas law should grow by the

life that is in it, not by the life that is outside of it. I should hate to think that the law did not derive its impulse from looking forward rather than from looking backwards, or, rather, that it did not derive its instruction from looking about and seeing what the circumstances of men actually are and what the impulses of justice necessarily are."

Sir Charles Fitzpatrick, chief justice of the Dominion of Canada, stirred the association with a patriotic speech in which he asserted Canada's pride in being a part of Great Britain, a nation which "keeps sacred its covenants and maintains its plighted word." Sir Charles described the growth of the Canadian colonial system and dwelt upon its points of superiority over the German system of colonization. He said some Americans inquire why a people of their same blood and lineage, and apparently of a manly and independent spirit, were content to remain in what they thought was a position of political inferiority and dependency. "This inquiry arises, I think, out of misconception of our relationship to the British crown," he said. "You would not, perhaps, say that the political status of an Englishman or a Scotchman was less free and independent than your own, but our position, you think, is different. We, on the contrary, recognize no inferiority in ourselves nor in our political position to that of the Englishman or the Scotchman. What little check the colonial relationship places upon us we think is far more than offset by the pride we have in the glorious history and traditions of the mother country. She first taught the world that the divine right of ruling is not vested in kings and princes but in the people. We glory in her literature and her laws, her poets, artists and statesmen. We glory in the men who live to serve her, and we reverence the memory of those who die to save her."

Mr. Root's Address.

SENATOR ELIHU ROOT addressed the association on the subject "The Layman's Criticism of the Lawyer." There was food for thought, Mr. Root said, in the colloquy on Blackheath between Jack Cade and his lieutenant Dick the butcher, in which the latter said, "The first thing we do, let's kill all the lawyers." "That plain unlettered men should have this feeling in England, when the justice to be administered was the king's law," Mr. Root continued, "may not have made so much difference, but the existence of this feeling in America, where the justice and the law are established, maintained, and enforced only by the authority of the very people among whom the feeling is found, is of very great importance. If we were to poll the great public outside the profession I fear that we should find an uncomfortable number who, in a mild way, agree with Dick the butcher."

Mr. Root said he thought it must be conceded that there is room for improvement in the administration of the law in this country. As to what might be done to improve the situation, he said, among other things, we could simplify the procedure of the courts, and improve our lawmaking. We make too many laws. He pointed out that during the five years from 1909 to 1913 inclusive our national and state legislatures passed 62,014 statutes. "Many of these statutes," said Mr. Root, "are drawn carelessly, ignorantly. Their terms are so vague, uncertain, doubtful, that they breed litigation inevitably. They are thrust into the body of existing laws without anybody taking the pains to ascertain what the existing laws are, what decisions the courts have made in applying and interpreting them, or what the resultant forces will be when the old laws and the new are brought together." As specific measures by which American legislation can be greatly improved Mr. Root advocated the establishment of a reference library for the use of each legislative body, and the employment of expert counsel, subject to be called on by the legislature and its committees, to put in proper form measures which are desired, so that they will be drawn with reference to previous legislation and existing decisions of the courts, and will be written in good English, brief, simple, clear and free from ambiguity and inconsistency. "There is a useless lawsuit in every useless word of a statute," said Mr. Root, "and every loose, sloppy phrase plays the part of the typhoid carrier."

Partnership Agreement by Public Prosecutor.

IT has not been an uncommon practice in districts throughout the country where the criminal business to be taken care of by the county prosecutor is relatively light, for the prosecuting attorney to form a partnership with an attorney in general practice, and by the partnership agreement make his official salary an asset of the partnership. Such a partnership agreement has recently been held by the Michigan supreme court to be contrary to public policy. See *Anderson* v. *Branstrum,* 173 Mich. 157, wherein it is held, albeit by a divided court, that an agreement to divide equally between partners the salary of the office of prosecuting attorney, to which office one of the parties, before or after the making of the agreement, succeeds, is void. The court makes its ruling upon the theory that the agreement, in substance and effect, assigns the salary of a public office before it is earned. Upon this theory the decision of the court is of course entirely logical. The courts have quite uniformly refused to enforce assignments of unearned emoluments of public office. See the note to *Schmitt* v. *Dowling,* Ann. Cas. 1913B, 1078. It is a little strange that in neither the majority nor the dissenting opinion in *Anderson* v. *Branstrum, supra,* is notice taken of the earlier but comparatively recent decision of the Michigan supreme court in *McGregor* v. *McGregor,* 130 Mich. 505, wherein it is held that an agreement by a public officer that his salary when earned shall become assets of a partnership of which he is a member is not against public policy. Such an agreement, the court holds, is not to be regarded as an assignment of an unearned salary as a public officer, but rather as an agreement as to the manner in which the salary shall be disposed of when earned and paid. This holding accords with the decision in *Thurston* v. *Fairman,* 9 Hun (N. Y.) 584, wherein the following provision in a partnership agreement was upheld: "It is understood and hereby agreed that all salaries, perquisites and earnings received by either partner from any office or employment is the property of the firm, and shall be accounted for and paid into the funds of the firm as soon as received, in the same manner as though it was received from the debtors of the firm." However, in *Gaston* v. *Drake,* 14 Nev. 175, 33 Am. Rep. 548, an agreement similar to that in *Anderson* v. *Branstrum, supra,* was held void on the broad ground of pub-

lic policy. In the Gaston case it appeared that the plaintiff and the defendant, who were law partners, agreed that the defendant should run for the office of district attorney, and, if elected, they should share equally the labors and the profits. "The tendency of the contract stated in the complaint," said the court, "was to induce plaintiff to use all his influence for defendant's election, even though he did not agree to do so, as found by the court. And such was its natural tendency. This arrangement may have induced him to influence ten men, or a hundred, to vote for defendant in opposition to preconceived political principles, and fixed ideas of right and duty; and, too, when they may have preferred his opponent as an incumbent of the office. Such a contract can not be upheld. Its tendency was to corrupt the people upon whose integrity and intelligence the safety of the state and nation depends—to lead voters to work for individual interests rather than the public welfare."

A difference of course will readily be seen between such cases as the Gaston case, where the agreement is made prior to the election, and cases where it is made afterwards. As said by the dissenting member of the court in the Michigan case, it may be of great advantage to the people of the State if the prosecuting attorney, who is usually a young man, has the benefit of being associated with a lawyer of greater experience.

The Oklahoma Jim Crow Law.

THE constitutionality of the Oklahoma separate coach law was recently argued in the United States Supreme Court. In addition to the usual requirement in such legislation of separate cars and waiting rooms for the white and negro races, the Oklahoma statute allows the railroads to use the chair cars, sleeping cars, and dining cars exclusively for one race. The negroes of the State contend that this is unlawful discrimination against them under the Federal Constitution, while the railroads on the other hand maintain that it is a justified distinction in service, as not enough negroes desire these facilities to pay the railroads for furnishing them separately. The law was upheld by the Circuit Court of Appeals, but by a divided court. See *McCabe* v. *Atchison, etc., R. Co.,* 186 Fed. 966, 109 C. C. A. 110.

The general question whether the so-called Jim Crow legislation violates the Fourteenth Amendment to the Constitution of the United States, in that the enforced separation of the negro race from the white race in railroad cars and waiting rooms abridges the privileges and immunities of the former, and denies to it the equal protection of the laws, is no longer an open one. The Supreme Court of the United States in *Plessy* v. *Ferguson,* 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256, has foreclosed further discussion on that question. Mr. Justice Brown, speaking for the court in that case, said in sustaining the Louisiana separate coach law: "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced. . . . So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."

The special feature of the Oklahoma statute, as already stated, is that it permits the railroad companies to haul sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately, but not jointly. This means, of course, that such cars will be provided for the white race but not for the black. The Circuit Court of Appeals (*McCabe* v. *Atchison, etc., R. Co., supra,*) in answering the contention that this feature of the law was unlawfully discriminatory, said, speaking through Adams, J.: "In our opinion this contention is not sound. Other parts of the statute make ample provision for the actual transportation of both races in reasonable comfort and convenience. Separate coaches or compartments equal in all points of comfort and convenience must, under severe penalties, be carried on each trip by every train moving within the state. (Sections 1 and 5.) Sleeping cars, dining cars, and chair cars are, comparatively speaking, luxuries, and properly enough no such imperative provisions are made concerning them as are made concerning the common and indispensable coach or compartment. The proviso imposes no obligation upon carriers to haul such cars for either race, but out of abundant caution, lest the former provisions of the act, the keynote of which is equality of service between the races, should be construed to require the carriers to constantly haul separate sleeping, dining, and chair cars for them, it is provided that they might haul them for the separate but not joint use of either of the races. This provision in itself makes no more discrimination against one race than the other. The legislature having in mind doubtless, what we judicially know, that the ability of the two races to indulge in luxuries, comforts, and conveniences was so dissimilar that sleeping and dining cars which would be well patronized by one race might be very little if at all by the other, legislated accordingly, and made a provision by which carriers might supply them for the exclusive use of either race as circumstances might dictate. It may be conceded

that the general principle of equality of service which pervades the Oklahoma statute and which is also required by the common and interstate commerce law (24 Stat. 379) must be observed by all carriers. As a general rule, if carriers haul cars of special and peculiar convenience for citizens of one race, they must provide equal service for citizens of the other race. Equality of service, however, does not necessarily mean identity of service; and manifestly this rule does not require permanent provision for equal service, irrespective of the demand for it. No mere question of abstract or theoretical right can require the constant and regular equipment and hauling of substantially empty dining, sleeping, or chair cars for either race. Practical considerations, which are potent in reaching a correct interpretation of any statute, cannot be ignored in applying the principle of equality of service to the two races in Oklahoma. Neither can any such interpretation be given to the statute of that state as would in effect require carriers to render service to either race without compensation. That would deprive them of their property without due process of law. We conclude, in view of these and other like considerations, that the principle of equality of service between the two races in Oklahoma contemplates substantial similarity of service, and this only when conditions and circumstances under which it is required are substantially the same."

Judge Sanborn files a vigorous dissenting opinion in the case, contending that the special feature of the law under consideration is clearly violative of the Fourteenth Amendment to the Federal Constitution; further, that the statute constitutes a breach of the contract between the people of the state of Oklahoma and the people of the nation made by the latter's acceptance of the condition of their admission as a state prescribed by section 3 of the enabling act (Statutes of Oklahoma 1909, p. 50) that "the constitution shall be republican in form and shall make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." Lastly, Judge Sanborn contends that the statute in question cannot be restricted lawfully by construction to intrastate passengers; that it applies to interstate passengers and interstate commerce to the same extent that it does to intrastate passengers and commerce, and for that reason is violative of the commerce clause of the Constitution.

The case presents a considerable area of debatable ground, and the decision of the United States Supreme Court will be awaited with interest.

The Law of Names.

SOME observations on names in their legal aspect are evoked by the report of a puzzling question that has been brought before the California Court of Appeals. It appears that a certain Mrs. White, a law student, who was formerly Mrs. Smith, has applied for admission to the bar under the name of Emma S. Smith. She has been told that she must reapply under the name of her present husband. This she refuses to do, insisting that nowhere in the statutes is there a provision requiring any woman to accept her husband's name; that it is simply a custom, and that she prefers to keep the name which she had prior to her marriage to White. So far as our investigations have gone, Mrs. White, or Smith, appears to be well within her rights. The law has been very liberal toward individuals in the matter of their names. At common law a man may change his name at will and sue or be sued in any name by which he is known and recognized. *Linton* v. *First Nat. Bank,* 10 Fed. 894. "A man's name," says the court in *Laflin & Rand Powder Co.* v. *Steytler,* 146 Pa. St. 434, "is the designation by which he is distinctively known in the community. Custom gives him the family name of his father, and such prænomina as his parents choose to put before it, and appropriate circumstances may require Sr. or Jr. as a further constituent part. But all this is only a general rule from which the individual may depart if he chooses. The legislature in 1852 provided a mode of changing the name, but that act was in affirmance and aid of the common law, to make a definite point of time at which a change shall take effect. But without the aid of that act a man may change his name or names, first or last, and when his neighbors and the community have acquiesced and recognized him by his new designation, that becomes his name."

In the case of *In re Snook,* 2 Hilt. (N. Y.) 566, Chief Judge Daly, in discussing the origin and development of surnames, mentions many instances where the color of the individual, as White, Black or Brown; his height or strength, as Little, Long, Hardy or Strong; mental or moral attributes, as Good, Wiley, Gay, Moody or Wise, fixed the surname. "The surname," says Judge Daly, "was frequently a chance appellation, assumed by the individual himself, or given to him by others, for some marked characteristic, such as his mental, moral or bodily qualities, some peculiarity or defect, or for some act he had done, which attached to his descendants, while sometimes it did not. . . . It was in this way that the bulk of our surnames, that are not of foreign extraction, originated and became permanent. They grew into general use, without any law commanding their adoption or prescribing any course or mode respecting them. . . . But though the custom is widespread and universal, for all males to bear the name of their parents, there is nothing in the law prohibiting a man from taking another name if he chooses. There is no penalty or punishment for so doing, nor any consequence growing out of it, except so far as it may lead to or cause a confounding of his identity."

In view of all the foregoing it would seem that our legal neophyte in California should have an unimpeachable right to take the name of Smith, although her husband's name is White. Abstractly considered there does not appear to be much choice between the two names. White and Smith: What should be in that Smith? Why should that name be sounded more than White? Write them together, White is as fair a name; sound them, it doth become the mouth as well; weigh them, it is as heavy; conjure with them, White will get a verdict as quick as Smith. All irrelevant and immaterial. Mrs. White has chosen to be Mrs. Smith and that the name of Smith shall bear the honors of her future forensic triumphs. And Smith let it be, say we.

"Roman law was all very well at Rome; medieval law in the middle age. But the modern man in toga, or a coat of mail, or a chasuble, is not only uncomfortable but unlovely." Maitland.

THE JUDICIAL RECALL.

IN Minnesota an amendment to the State constitution, proposed by the last legislature, providing for the recall of public officials, including judges, will be voted on at the ensuing general election. Mr. Rome G. Brown of Minneapolis, chairman of the American Bar Association Committee to Oppose Judicial Recall, was instrumental in having the Judicial Recall made the subject of debates in Minnesota High Schools last winter, and furnished a large amount of material to all debaters, especially those against the recall. This produced a class of students throughout the State who were able to consider the subject intelligently, and the result is illustrated by the able paper presented by Arthur O. Lee of the Madison High School, Madison, Minn., which was awarded the first prize in the essay contest instituted by Mr. Brown last spring. The prize essay by young Lee is, as Mr. Brown says in sending it to us, a remarkable production for a high school lad of seventeen, and worthy of publication in full in LAW NOTES, especially in view of the circumstances under which it was produced. No better argument against the recall, says Mr. Brown, has been made by an American lawyer. The essay follows:

A determined and widespread attack is being made upon the old and established order of things political. It is asserted that we have outgrown our constitution; that government is not sufficiently direct and responsive; that our courts are usurping legislative powers; that they are abusing their high offices in the interests of special privilege, and that justice is being delayed.

The popular unrest that has arisen has received its proportions, not so much from the nature of the conditions calculated to produce it as from the contagion produced among the impressionable populace by the Socialists and the so-called progressives, who, with their radical ideas of democracy, are traversing the states of our nation fascinating and enchaining the imagination of the people with the hue and cry about "popular" government. The idea of "direct government," "popular control" and the rest of the catch phrases of the propaganda of so-called progressivism are alluring to the average everyday citizen who has neither the time, the inclination nor the capacity to make more than a superficial analysis of what it means and embodies.

The recall epidemic has reached Minnesota, and a constitutional amendment is up for approval or rejection, as the voters of this state see fit, providing for the recall of all public officials, elective and appointive. This includes judges. It is urged by the "progressives" who brought the proposal into prominence that we need more direct and responsive government, and that in view of the abuses in our judiciary the people should exercise a direct restraint upon the actions of the judges. In short, the underlying purpose is to control, by the arbitrary exercise of the popular will at recall elections, the acts and tenure of public officials, including the judiciary.

Those who advocate the recall attempt to justify the adoption of such a proposal by citing cases of delayed justice, drawn-out litigations and usurpation of legislative functions by the judiciary.

As to delayed justice, long litigations and technical imperfections in our judicial system, no one can consistently claim that the exercise of the recall would tend to ameliorate these conditions. In fact, it was not originally proposed in order to meet these difficulties. However, it is claimed that we need to exercise a check upon judges who frequently usurp powers, not properly theirs, to declare laws unconstitutional. This, with the argument for a direct democracy, is advanced as a principal reason why the state of Minnesota should incorporate into its constitution the provision for the recall of public officials, including judges.

It is claimed that the courts have overstepped their authority by assuming to declare laws unconstitutional. But what is the limit of the authority of a court in a case where a law is seen in fact to be void and unconstitutional? American courts, since the beginning, have claimed this duty as a proper function under our constitutional system. Professor Thayer of Harvard, in his constitutional discussions, proves that when the judiciary declares an act repugnant to the organic law it is acting in its proper sphere. In fact this function of the judiciary has become an essential feature of our governmental system. This, then, is not usurpation, much less does it constitute a ground for adopting the recall.

When the exponents of the recall, in trying to justify their proposal, attempt to show that the judges in the good state of Minnesota are corrupt and inefficient, they miserably fail to present an argument. The judiciary of Minnesota has always presented and gives assurance of presenting to its citizens a class of the most honorable and patriotic-spirited men in the profession. Our courts thus far have been above reproach, and the criticism directed against their honesty and integrity stands unsubstantiated.

There is not one consistent reason why Minnesota should make the recall a part of the organic law of the state. It is not a constructive step. It is reactionary and retrogressive, a step back to the dark ages of government.

Analyzed to its logical conclusion the adoption of the recall means that our representative form of government is to be substituted by a direct or an unlimited democracy. No proposition could strike more directly at the heart of representative government. We are told that representative government, which is the one great political bequest from the growing development of the progressive nations of the world, has failed. We are urged in the name of "progress" to adopt the instruments of socialism, including the recall, in order that our government shall become more direct and responsive. But direct democracy is nothing new. It existed in cultured Athens and in civilized Rome. It prevailed in bloody France. The history of these nations is an instructive memory. In them direct government by the numerical majority failed. In them the ideal theory was shattered. And they had the initiative, the referendum and the recall democracy.

Ostracism in Athens operated on the same principle as does the recall. There is no essential difference between the form of those old-time governments that have failed and the form now proposed. Those who uphold the recall argue that times have changed, that conditions are different and that what applied to those past nations could present no lesson to us. But, while we admit that great changes have crept over our civilization, we emphatically deny that fundamental principles and governmental axioms have materially changed. Human nature is the same to-day as it was in Greece and France. Con-

ditions change, ingrained principles and human nature endure.

Do men realize that by instituting a direct vote on the political and economic questions confronting the judiciary in our complex American life they are casting the established idea of representative government on the rubbish heap and taking from the same rubbish heap the discarded and cast-off principle of direct and unlimited democracy? Why should we disregard historical illustration when the political history of the world shows that where pure democracy has failed representative government has succeeded on its ruins? The men who framed our splendid constitution considered the different forms of government, including direct democracy, and decided in favor of representative government, which, under our constitutional system, has become the model of the world.

Then why should we change our form of government? Are we justified in bequeathing to posterity a system of government inferior to that which we have inherited and hold in sacred trust? When conditions do not and cannot warrant a radical change, have we the moral right to undo in a single stroke the finished product of 500 years of Anglo-Saxon development of the idea of representative government?

Now let us test the proposition of popular recall in the light of a few fundamental principles. There are certain inalienable rights which inhere in free government and which are recognized in all constitutions. Among these rights there is none more important than this—that no citizen shall be deprived of his liberty or property except by the judgment of the law and after a trial before an independent and impartial tribunal. This is the keystone of the arch. The majority of the legal voters cannot constitute itself such tribunal. If it does, there is no sure or stable protection for the rights of any individual or of any minority.

Most common among the class of cases that come up before the law are those in which one of the parties is in fact, if not in name, the people themselves or the temporarily popular majority. It is generally contended in these cases that some fundamental right of the individual or of the minority is being violated. In such cases how is the independence of the tribunal which is dependent upon one of the contracting parties to be maintained? Take a common case. A popular majority, through the legislatures elected by it, enacts a statute requiring railroads to carry passengers for 2 cents a mile, or 2 cents for 10 miles. In the test case that comes before the court the railroad claims that the act robs it of its property. The court, after hearing and study of the facts, sustains this claim. Being dissatisfied with the decision, the popular majority recalls the judges who gave the decision and elects judges who will reverse the decision. Which is the determining power? Is it not the popular majority which has constituted itself the court in its own case?

Let us examine the recall in the light of another fundamental principle. When the same power which enacts a law also decides whether the particular case comes within that law, we call it a despotism. There is no separation of powers and functions. On the other hand, in a free government one body makes the law, while another body decides whether the particular case comes within the law. Thus the citizen is protected, because the legislative and judicial departments are kept separate. Now if the popular majority not only makes the law, but also decides whether a given case falls within it, then the legislative and judicial powers are united. The government then ceases to be free. It is a despotism, the despotic tyranny of popular majorities.

Not only is the judicial recall wrong in principle, but its effect would be to destroy the independence of the judiciary and, in the last analysis, to destroy the functions of the judiciary itself. The real progressive tendency during the last half century has been to build up an independent, untrammeled judiciary, recognizing no master, catering to no party or faction and administering justice according to law. But the recall proposition is a direct blow at this progressive development of an independent judiciary.

Basing their argument on the assumption that the judge is an agent or servant of the people, the opposition reach the conclusion that the people have the privilege of recalling their agent when he fails to satisfy the popular majority. The fallacy in the argument is in the assumption that the judge is an agent of the people. He is not an "agent" in any sense of the word. The peculiar character of the judicial office makes it imperative that he exercise his functions impartially, recognizing no constituency whatever, except as Marshall said, "his conscience and his God." To make the judge dependent upon the public in a case in which the public is a party is to make the judge dependent upon the will of one of the parties upon whose claim he is to pass judgment. No sane man would be willing to have judgment passed upon him under such circumstances. It is precisely this state of affairs which it is the main object of the Socialists to bring about. They would have the majority pass statutes confiscating private property and, by the judicial recall, allow the same majority to coerce the courts into allowing such statutes to be enforced. They would eliminate private property by eliminating the present power of the courts to protect it.

The effect of the recall upon the personnel and character of the judiciary would be anything but salutary. By the very nature of things the recall will, and necessarily must, lower the judical standard. Claiming that the impeachment process is too cumbersome, those who advocate the recall urge that the people should be given the power to remove inefficient or corrupt judges and elect better judges. But the feasibility of this is questionable. What constitutes inefficiency or incompetency? Can you expect a defeated litigant to judge judicial capacity fairly? Is it rational to attempt to determine the legal and constitutional correctness of a judgment by popular vote? Would it not be considered irrational to have the competency of a physician passed upon by popular vote? The electorate, especially in a case of a supreme judge, would be uninformed concerning the character of a certain judge charged by a few with incompetency. How, except by an extended campaign of education costing thousands of dollars, which corporations and special interests only could afford, could the character of a judge be determined? Then what reason is there to suppose that the electorate will do better concerning the selection of the second judge? Remember that the same power which created the bad judge in the first place is creating the next one. Is that body, to which the demagogues subtly refer as the "people," infallible?

Consider the question of corruption charged against a judge. Is it justice to have his honesty determined by popular vote after a heated campaign in which stump orators and demagogues have vied with one another in presenting trumped-up charges and exaggerated statements vilifying the character of a judge? How will the judge single-handedly combat these agitators and attend to his judicial duties at the same time?

The indignity and disrespect to which our judges will be made subject under the threat and operation of the recall will work disaster on the personnel of our judiciary. What successful lawyer will leave his practice to hold an uncertain and discredited office? What class of judges will such a state of affairs tend to produce? Does it stand to reason that the threat of recall, hanging over the head of a judge like a sword of Damocles, will make him a better judge? Will men who possess true judicial caliber consent to being coddled into accepting an office whose tenure is controlled by fluctuating popular majorities?

Hamilton, Madison and Marshall said that the complete independence of the judiciary was absolutely essential under our form of government. In order to perform its high function the judiciary must be independent of the legislative power no less than of the power of popular majorities. To fuse the judicial and legislative functions is to destroy that separateness which was intended to exist between the three departments of government. To make the judge the tool of temporary popular majority, compelling him upon threat of recall to obey every changing whim and caprice of public opinion, is to make him, not the exponent of what the law is, but of what the people, for the time being, think they want it to be. Under such a regime we shall have a government of men, not a government of laws.

But the insidious and undermining influence of the recall does not end here. The duty of the judiciary is to protect constitutional safeguards, to secure the rights of individuals and minorities, however small. A judge, held in jeopardy by threat of arbitrary recall, cannot by the very nature of things exercise this function independently, fearlessly or impartially. He has got to look to the wishes of the faction which has made possible his election. If he disregards their mandates, this faction will, by employing the recall, proceed to replace the inflexible judge with a pliant reed, dependent upon their commands. When such a state of affairs comes to exist, as it unavoidably must under the recall, the people of Minnesota must expect the nullification of constitutional protection through the destruction of the independence of the judiciary.

By constitutional safeguards we mean those liberties and established rights which inhere in free government. The first ten amendments embody these rights almost in their entirety. They are written into the fundamental law of our land and are the distinguishing feature of our constitution, written as they are in the shape of definite constitutional provisions insuring to every citizen the right of life, liberty, property and human happiness. These limitations upon the governing power have made our government the scientific basis of the constitutions of the world. These are the limitations which by reason of the recall agitation are being seriously threatened at the present time. The citizen who really understands that the adoption of the recall will directly, through the destruction of the independence of the judiciary, and indirectly, through the nullification of constitutional safeguards, work against the basic principles of true government, will never be found placing his mark of approval opposite the proposed amendment.

But there are further objections to this boasted cure-all, the popular recall. Its impracticability alone must prohibit it from ever becoming a workable instrument. The expense of getting petitions signed, of conducting a campaign of education regarding the qualifications of a certain judge, and the outlay connected with recall election must necessarily be immoderately great, especially so in the case of a supreme court judge. The middle class, which usually bears the brunt of such burdens, will not be able to exercise the use of the recall. Rather, you will find it will be the rich, influential litigants defeated in court trials, corporation-owned and controlled presses, special privilege interests and other self-serving elements, that will have the means and the influences to bring about the recall of a judge who dares to act without consulting their wishes.

If there ever was such a thing as bribery and corruption we shall have it in the judiciary if the tenure of that body is to be controlled by those who are financially the most powerful and influential. A campaign of slander, misrepresentation and vilification can be carried against a judge by powerful interests, and the retention of a fair, impartial judge will be next to an impossibility. The recall is not an instrument designed to be employed by the forces of democracy. It is, rather, an instrument whereby plutocracy and wealth, hiding behind the protection of the recall, can perpetrate crimes darker than any which ever stained the history of the judiciary.

Voters of Minnesota, this is the recall and such its meaning. If you vote for the recall amendment you have got to take all that goes with it. Remember that the recall is not a panacea for the technical imperfections in our judiciary. Remember that it means the overthrowing of representative government and the substitution for it of direct and unlimited democracy. Remember that it means the destruction of the independence of our judiciary and of the judicial department itself. Remember that, through the destruction of the independence of the judiciary, it means the nullification of constitutional safeguards, thus establishing socialism, menacing every right of property and of liberty which you now cherish, menacing even your very existence. Remember that it is impracticable and unworkable, a two-edged sword, destructive of the judiciary and destructive of the interests of the people. Remember that it is fundamentally and totally reactionary, subversive of all true government and repugnant to all the fundamental principles for which civilized man, since the signing of Magna Charta, has fought.

"There are certain fundamental rights which no man can barter away, such, for instance, as his right to life and personal freedom, and, in criminal cases, the right to be tried by a jury of his peers. Courts have even gone so far as to say that a man cannot consent to be tried by a jury of less than twelve men, whatever may be the circumstances under which the twelfth man is taken from the panel." Brown, J. Pope Mfg. Co. *v.* Gormully, 144 U. S. 234.

THE STOPPING POINT IN LITIGATION.*

ONE of the most serious defects in our law which makes for interminable litigation, which makes the stopping point of a lawsuit a thing impossible to even surmise, is the continuance of that ancient conflict between the power of the court and the power of the jury in jury cases—a conflict which has cost American litigants millions of dollars. If we were to attempt to classify American theories of jury trial, all of which are supposed to have had a common origin in the common law, we should find the jury theories of our American courts divided into three classes: First, those in which the verdict of the jury upon questions of fact, including amount of damages, is final and absolute and over which the courts have no control whatever. Second, those in which, as in the Federal Courts, there is a preliminary question for a court as to whether the plaintiff or defendant, as the case may be, has introduced sufficient evidence to make not a nominal but an actual question of fact. In those courts, if one party, for example, has produced a little evidence and the other such a mass of evidence in contradiction that a verdict for the weaker party would have to be set aside as against the weight of evidence, the court has the power to dismiss or direct a verdict for the party whose proof preponderates. This rule has worked well in the Federal Courts. The first rule, that which turns over the whole question of justice on the facts to a lay jury, leaving the power of the court paralyzed to prevent miscarriage of justice, has worked badly, though it still continues in many states, more especially in those of the south and west.

There is, at least, a rough logic in the rule which gives the jury complete control over questions of fact. There is also a logic in the other rule, that of the Federal Courts. which gives the court a definite standing in the trial of a case by jury, and which enables the judge to perform a clearly specified function on such trials. There is, however, in the mongrel rule of New York neither logic nor common sense. It is a rule which today makes with us for interminable litigation and prevents, at least in theory and too often in practice, any stopping point being reached in jury cases, where the plaintiff has evidence on his side, which, if undisputed, would be sufficient to warrant a verdict in his favor. I cannot ask you to follow all the ramifications of the New York rules. Certain aspects of them may, however, be briefly set forth. Up to about 1901, it was well established in New York that where there is no evidence upon an issue before the jury, or where the weight of the evidence so far preponderated in favor of one side that a verdict contrary to it would be set aside, that it was the duty of the trial judge to non-suit or to direct the verdict, as the case might require. Sometime in 1901, the Court of Appeals suddenly woke up to the realization that for a century or more New York had been disregarding the requirements of a constitutional right of trial by jury, and repudiating a long line of decisions which had been its law for that period. It retained, however, the power of review in its appeal courts to re-examine the facts and set aside verdicts when rendered against the weight of evidence, but it declared that a *new trial* must be granted before another jury so that the issue of fact might ultimately be determined by the tribunal to which these questions are confided. Following this decision came the three trial rule, which roughly stated is this: The plaintiff who has a single witness in his favor or who testifies alone to facts which uncontradicted would entitle him to a judgment may have a verdict in his case set aside three times and a new trial ordered in each case, but if three juries agree, the appellate court must acquiesce in the third verdict, the court declaring that unless circumstances are extraordinary and the verdict is clearly outrageous (whatever that may mean), the court is not justified in setting aside a third verdict upon the same facts. This three trial rule was followed by another rule which declared that the granting of a new trial because the verdict was against the weight of evidence is not a matter of justice, but a matter of favor to the defeated party and is a favor which may not be continued *ad infinitum,* but if the verdict is unchanged after two or three trials before the tribunal which is the arbiter of the facts, then the trial judge or the court must acquiesce in the determination of the body in whom the final decision is lodged by the fundamental law. Repeated trials due to the effort of the courts to prevent injustice, justice considered, however, as a matter of favor and not of right, are logical but monstrous corollaries of the original mistake in setting aside the old rule and depriving the trial judge of the power which the Federal Judges have exercised since the establishment of the Federal Judiciary.

I am dealing here, not with law in its application to the history of jurisprudence or to logic, but with law in its application to the practical requirements of the community. How can we possibly justify to a community the perpetuation of such a system? To tell a layman who has been sued, or who is about to bring suit where the plaintiff's right to recover is doubtful, the exact situation which he is bound to confront if a lawsuit is started would be to tell him something like this: The claim is one apparently which should be sent to a jury. There is enough evidence which uncontradicted would entitle the plaintiff to a recovery. There is so much evidence in opposition to the claim that the preponderance of evidence is against him. To advise him what will occur in all probability is that the case will be tried once, and if he gets a verdict it will be set aside, either by the trial court or the appeal court; that a new trial will be ordered by which the whole matter will be thrashed out again and his second verdict, if he recover one, will be again set aside by the Appellate Court; that a third trial of the whole matter will then be required, and that on that appeal from that verdict it is possible that the Appellate Court will let it alone, is to explain to him a system which from his standpoint is intolerable and monstrous, and yet it is a system which has been operating not only in New York but in many other states for years. It is fair to say that the third trial rule is not quite so clear with us as it was a few years ago. One of our Appellate Courts has declared in one case in which there had been four trials in this treadmill fashion, that it did not make any difference how many times the jury reached the same verdict. It declared:

"The jury having no right to render the verdict, the judgment entered thereon is wrong, and to permit it to stand is, by judicial decree, to compel one person to give property to another. This the court has no more right to do than the jury had to render its verdict, and to do so would be wrong, and the two wrongs would not make a right. It matters not, therefore, how many times a jury may render a verdict upon this evidence, a judgment based thereon cannot be permitted to stand if the court discharges its duty."

This new rule is not much more satisfactory than the three verdict rule. It practically tells both parties to the litigation that the court has no terminal facilities whatever, that the plaintiff has an interminable right to present the same facts, get the same verdict and have it set aside and a new trial ordered, until he or his adversary is exhausted or bankrupt. I have in mind

*Address of Mr. George W. Alger, before the New Jersey State Bar Association, at Atlantic City, N. J., on June 13, 1914

now a complicated broker's case, which had been tried four times, and in which the attorney for the plaintiff, after the last verdict in his favor, declared that he had spent an entire year of his life on this litigation. The verdict has been set aside and there is a new trial coming. Whatever we lawyers may think about such a system, it is from the standpoint of the community intolerable and a blot on the system of justice.

I suppose you have been listening to this story of the errors of New York as something which has no application to your own procedure. I am not so sure about that. While it is with diffidence that I refer to new trial abuses in New Jersey practice, my impression is that the actual difference between us is rather slight. Your rule, if I understand it, is not logical like the Federal Rule or "the jury, the sole-judge" rule, nor mongrel like New York's rule, but self-contradictory. Your courts declare that the trial judge should direct a verdict, when any number of verdicts if found otherwise than as ordered would be set aside as without substantial evidence to support it, or when the testimony in the case will not support any other verdict, but you immediately add: "The trial court cannot direct a verdict when any material facts which the parties have been permitted to introduce are in dispute." I am inclined to think that an actual comparison of cases would indicate that in actual practice our trial and appellate courts in New York, in disregard of the theory which I have been discussing, actually dismiss more flimsy cases than do your courts in New Jersey.

I am convinced that the jury trial system must require modification to continue in America. England, as you know, has abolished trial by jury as a matter of right in all cases, except in the relatively small classes of libel, slander, criminal conversation and breach of promise of marriage. Having done so, she has then empowered her appellate courts to render final judgment on appeal by correcting the errors of the courts below—a thing which is yet impossible in any American state in jury cases.

Few of us wish the jury trial abolished, but to make it a modern instrument of justice it requires very great changes, very few of which are yet in evidence. We needlessly waste the time of more citizens called for jury service than there is any real reason for doing. We keep a multitude of men sitting around doing nothing, but following the Miltonic aphorism that "They also serve who only stand and wait." We waste their time, not only before they are empanelled as jurors, but afterwards as well, with the general result that the class of jurors we most require for the intelligent consideration of our cases are the ones most anxious to escape the meshes of an institution, which, as a business proposition, is a calamitous failure.

I will finish what I have to say about the features which make for interminability in trials which pertain to trial courts with two brief references to two other defects which need remedy. We all of us complain of the amount of perjury which new trials seem to involve. It is human nature, though a rather bad kind of human nature, which seeks to avoid the defects of a ruinous decree by changing the evidence on a new trial. What can we do to eliminate this changing of evidence, assuming, as we may, that most new trials cannot be entirely avoided? Why is it not possible to make some provision by which the testimony of the preceding trial must be read as given on the first trial, and not permit the plaintiff or the defendant to vary that testimony, but require the party if he has additional testimony to add it to the previous record? The original witnesses can be subpœnaed and produced so that the jury can see them, and any additional testimony they may be permitted to give should be subject to the rigid control of the court, so that the process of beating a judgment on appeal by false testimony on a new trial can be avoided. Of course we all realize the desirability of having witnesses examined in open court before the jury, as the best method of having the jury determine their credibility by seeing how they behave on the stand. It is more important, however, to prevent the party on the new trial from changing his case. The benefit which would be retained by requiring the testimony to be read in the presence of the witnesses and of the jury without its being doctored to meet the exigencies of an Appellate Court decision would more than offset the importance of having those same witnesses go on the witness stand and be subjected to a further examination of the same facts. Something of this sort I think could be done without violating the constitutional right of trial by jury. If it cannot be done, other methods of relief must be sought.

A further change which would be helpful would, I think, be a rule which would require in every case where either party desired a trial by jury to make them ask for it, and, instead of putting all the cases in which the right to jury trial exists on the jury calendar, to put only those cases in which the right is demanded by the parties. There are a great many cases in which trial by jury exists as a matter of right, but in which a jury is not really wanted by either party. They take the jury as a matter of sheer inertia. The case goes on in the ordinary way on the jury calendar when it could be better tried by a judge without a jury. This inertia would be largely overcome and we would have a larger percentage of our complicated cases tried by judges if the jury trial was not a mere matter of course, but was something which the parties had to affirmatively demand and in the absence of such a demand the case would take its course for trial without a jury.

I have been dealing thus far with jury trials, because they constitute our most serious problem. In equity cases, speaking generally, the law is just as bad as the courts make it and no worse. Our courts have generally in equity cases had broad powers, subject to few constitutional limitations, and if they fail to do justice in equity cases, the greater part of the blame is on the courts themselves. The jury problem is one on which the courts are handicapped by constitutional limitations. I have made my criticisms of the existing method of jury trials, not because I am an opponent to the jury system, but because it seems to me that it is unnecessarily working badly and that something should be done to obviate defects over which the courts have not the same power that they have over their own special branch of the law—the equity case.

Brief reference to the defects which interfere with the proper stopping point in litigation in the Appellate Courts, in which there are a few things which seem to me to deserve attention. The first is this: We print too much stuff. From the layman's standpoint the practice of law often seems like a conspiracy between the lawyers and the printers. So far as I can see there has been little tendency to eliminate the printer's evil. Our tendency in New York in recent years has been rather to increase the printing expense of appeal cases than the other way about. Now we print everything. If there should be a rule adopted in New York, for example, that criminal cases should go up on the stenographer's testimony of the original trial, with printed briefs, instead of the fat records which the law makes compulsory now, we would get a great deal more speed, and I am sure that no one would lose anything except the printer. A good long paper could be written on the printer as an obstacle to justice, but if the effect of the enormous cost of appeal records can make our profession focus its mind on the relative desirability of correct trials in the courts below, instead of spending our time on adulation of

appeal courts and considering the trial judge as a sort of doorkeeper to the house of justice, the printer's evil would be worth what it costs. We have in New York inaugurated some reforms of a far-reaching character by which our appeal courts to-day are empowered to render final judgment without a new trial being ordered in all equity cases, the court making such additional findings of fact as the record may warrant. It also has the power in cases which have been tried by jury and in which the plaintiff has not made out a prima facie case, not only to set aside the verdict, but to dismiss the case, as the trial judge should have done. In equity cases we need to supplement the machinery of our appeal courts, to take additional testimony on points not covered by the record which the court deems essential to a final judgment. Our courts can do it in certain cases and so can yours under the Practice Act. They do not do it very often, and they have not the necessary assistance to enable them to do it very well, but the principle that there should be no new trials which can possibly be avoided is one which requires every necessary extension of the powers of appellate courts with that end in view.

I am aware that your New Practice Act is considered a great step in advance; that the millennium has come to New Jersey because you have adopted it. We had a sad experience when we adopted our first Code—not the complex thing we have now, but the small Code which purported to accomplish a large part of the reforms you have recently inaugurated. Your Practice Act will have the fate of our Code, unless it receives the hearty co-operation of the bar and the judges. Our Code on the start had the opposition of both.

This has been a long paper, and you will be glad to have it brought to a close. The subject which I have attempted to consider is one of the greatest possible importance. The bar and the judiciary in America are on trial to-day for inefficiency. Some of the charges are false; many of them are true. To remove the blots of our system we should receive the active and patriotic support of our profession as citizens. A few weeks ago a twenty-three years old lawsuit reached its termination in New York. It had involved in its trial and retrials the services of 45 judges, 95 lawyers and 249 witnesses. It had outlived 17 judges, 13 lawyers, and 42 witnesses. Plaintiff finally obtained a judgment for $48,000 in his favor, and claims to have spent $186,000 in counsel fees. When the decision of the Court of Appeals in his favor was announced to the successful plaintiff, he is reported to have said in comment, "I win, but I lose." The substantial part of the business life of these litigants has been spent in one litigation. Heart-burnings and ill feelings had occupied for all these years the minds of these contestants. Its termination was not a triumph, but a failure. Let us remember that from the standpoint of the community, there can be no system of justice which is satisfactory, under which any such results are possible, under which any such delays and expenses can be entailed. Let us remember that from the standpoint of the litigant and the community, the stopping point is an essential part of every well organized system of justice.

"Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it." Brewer, J. Schick *v.* U. S., 195 U. S. 69.

AN EXISTING DEFECT IN THE AMERICAN SYSTEM OF LEGAL EDUCATION*

IN America, three systems of legal education are distinctly marked. During the Colonial period, about 150 young gentlemen went to London and entered the Inns of Court, the majority being from the Southern and Middle States, and, strange to say, but two from New England. Returning, they brought back a knowledge of the law books most in use, and, what was better, they brought the books themselves. There is ample evidence of this in American libraries. Those who stayed at home were office pupils, left largely to their own devices in wandering through repulsive mazes, much as did their English and absent American brethren, by following more or less intelligently the scheme of Sir Matthew Hale. Then a great light appeared. In addition to comparatively numerous copies printed in England. Blackstone's Commentaries were printed in Philadelphia in 1771, and among the subscribers were the subsequently eminent names of the Adamses, the Jays, the Huntingtons, the Dickinsons, the Livingstons, the Quincys, the Rawles, the Tilghmans, the Trumbulls and the Wilsons. The effect upon student life was immediate. James Kent says: "I retired to a country village, and, finding Blackstone's Commentaries, I read the four volumes. . . . The work inspired me at the age of fifteen with awe, and I fondly determined to be a lawyer."

Then came the second stage. A chair of law was founded in Virginia at William and Mary College in 1779; in the same year Isaac Royall gave property to Harvard College for establishing the professorship which still bears his name. In 1784, the Litchfield Law School in Connecticut—a private school—was begun, and in 1790 James Wilson delivered elaborate and comprehensive lectures at the University of Pennsylvania. These early efforts were followed during the greater part of a century by the more persistent and fruitful labors of Kent, Story, Sharswood, and still later by Dwight and Langdell. Instruction by lectures in a law school was associated with student work in the offices of active practitioners. The creed of that day can best be stated in the language of men of that day. Horace Binney, writing in 1830, declared "There are two very different methods of acquiring a knowledge of the law, and by each of them men have succeeded in public estimation to an almost equal extent. One of them, which may be called the old way, is a methodical study of the general system of law, and of its grounds and reasons, beginning with the fundamental law of estates and tenures, and pursuing the derivative branches in logical succession, and the collateral subjects in due order. . . . The other is to get an outline of the system by the aid of commentaries, and to fill it up by a desultory reading of treatises and reports, according to the bent of the student, without much shape or certainty in the knowledge so acquired, until it is given by investigations in the course of practice. . . . The profession itself knows the first, by its fruits, to be the most effectual way of making a great lawyer."

George Sharswood, in 1856, in discussing the part of a law school in a system of legal education, wrote: "A law school, law lectures and recitations, essays and forensic discussions, can act properly only as auxiliary to the studies of the law office. . . . I am firmly persuaded that nothing can nor ought to dispense with the necessity of a regular clerkship in the office of a practicing attorney. It is there alone the student can be rightly

* From a paper read before the Section of Legal Education of the American Bar Association by Hampton L. Carson, of the Philadelphia Bar, at Washington, D. C., October 20th, 1914.

trained, daily watched, warned, directed and encouraged. The labors and avocations of an office are necessary, not merely to give some insight into business and prevent the growth of habits of indolence, but to keep the student from reading too many books, to oblige him to think more, and frequently to turn back and review what he has read."

Place beside the foregoing extracts the points insisted on by Professor Thayer of the Harvard Law School in an address read by him at Detroit in 1895, as Chairman of the Section on Legal Education of this Association, and we reach the third American system. He insisted that "our law must be studied and taught at the universities as other great sciences are studied and taught, as deeply, by like methods, and with as thorough a concentration and life-long devotion of all the powers of a learned and studious faculty." He dwelt upon the importance of research work, of historical study, of vast labors, to enable men to understand the law, as having its roots in the past, and capable of reduction to intelligible theories of rights and remedies. After replying with much spirit to sneers at the labors of "the doctrinaire or closet student," he presented, *inter alia,* the following points: (1) Limiting the task of an instructor to a single subject, or, if more than one, to nearly related subjects, "to the end that his work of instruction may be thoroughly done, and that, as the final outcome of his studies, some solid, public and permanent contribution may be made to the main topic which he has in hand." (2) That instructors shall give substantially their whole time and strength to the work. (3) That the pupils also shall give all their time to the work of legal study while they are about it. He adds: "It is, I think, a delusion to suppose that this precious seed-time can be profitably employed in any degree, in attendance upon the courts, or in apprenticeship in an office." He was sternly against "systematic attempts to combine attendance at law schools with office work and with watching the courts." These views, which were those of a scholar of rare spirit and still rarer preparations, being strongly backed by the influences and sympathies which sustained Pollock, Maitland, Bryce, Dicey and Anson in England against the squinting scorn of near-sighted critics, have so far won their way that it is safe to assert that in most law schools, certainly in those best known to the country at large, the really active members of the faculty devote their time exclusively to the duties of their chairs, and the student body is, in the main, no longer known to the offices of practitioners. The change is fundamental and in a certain sense revolutionary. It has led to the surrender of the practice prevailing in America from the first years of the nation, a practice based upon that prevailing in England during the third historical period of development, and so strongly supported by Binney and Sharswood, and approved by such lawyers as Lord Cairns and Sir Fitzroy Kelley and Sir Samuel Romilly. In cutting loose from the offices, and in immersing students in academic halls, there has been a return to the university system, the most ancient of all, and an abandonment of the most characteristic features of all subsequent systems. In pressing the university system forward on the modern lines of thoroughness and isolation from distractions of the work-a-day world, the university system has been strengthened and vastly improved in efficiency, but none the less through the surrender of the cherished convictions of the older school of lawyers. It was with the purpose of bringing this fact out in all its significance that I spent time upon the foregoing historical review.

Have we gained by the change? In the disappearance of the old-fashioned professor, arguing cases in court in the morning and lecturing from manuscript to his classes in the afternoon, I think that we have gained in the thoroughness, the efficiency, the regularity and punctuality by which substantive law is now taught. A man with a natural love and aptitude for teaching, willing to sacrifice the prospects of success and pecuniary prizes at the bar far in excess of a professor's salary, because of his love of the work of delving into sources, of digging up and arranging matter, or reducing unwieldy masses, of analyzing cases, of extracting principles, of securing results, a man who looks to general rules rather than to particular exceptions, who has the gift of clear and precise statement, who can arouse and keep upon the stretch the enthusiasms of his pupils and who has so far devoted himself to the historical evolution of the law as to know its geography, its latitude and longitude, its coast lines, its deep seas, and its shallows—such a man is a far better teacher and produces far more effective and lasting results than the overtaxed gladiator of the forum could ever hope to be, or ever succeeded in being.

Have we lost by the change? In my judgment, we have lost, to a menacing extent, that which gave *tone* to the profession. We have lost the old-fashioned preceptor, setting an example of deportment, of dignity, of professional morality, through meeting his clients in the presence of his students, or by talking familiarly to them of the standards set by tradition, based upon the conduct of the best and purest in the profession. We have lost the old-fashioned student, who hung upon the preceptor's lips, who copied his papers, who served his notices, who kept his docket, who assisted in the preparation of his briefs, who carried his books to court, and who did generally what the office boy and the stenographer and the library page and tipstaff now do. There was nothing menial in all these acts. They were the familiar features of a legal apprenticeship which drew preceptor and pupil together in intimate but unstudied relations, and which furnished opportunities to the pupil of observing how a high-minded practitioner adhered in letter, in spirit and in conduct to his professional oath to act at all times "with all due fidelity to the court as well as to the client"; how he regarded his calling as intended to promote justice and right wrong, rather than to exercise art and chicanery for purposes of gain; how he refused to soil his hands with business of a doubtful character, although tempting in its prospects; how he refrained from the tricks of enticing business to his office, and never stooped to underbidding or depreciating his most successful rivals; how he chivalrously declined to enforce purely technical advantages over an adversary who had unwittingly slipped his guard; how he scorned contingent fees, or substantial partnerships in the subject-matter of litigation; how he spurned entreaties to mace by threats of litigation which he knew to be legally groundless; how he guided a failing debtor with a fine respect for the rights of creditors, and never connived at the concealment of assets; how he understood the morality as well as immorality of the statutes of limitation; how he strictly regarded his word; how he was ready to compose differences instead of fomenting strife; how he was accurate in his knowledge of the clerk's office, and the uses of process; how he was skillful and frank in his correspondence; how he never trifled with his conscience in the preparation of affidavits; how he was scrupulous in the ascertainment of facts, and never delayed a just demand by dilatory tactics; how he treated a court with courtesy without obsequiousness, and an adversary with fairness, but with unflinching firmness; how he sought the truth from witnesses without bullying; how he never misstated the evidence or perverted authority; how he met every situation with candor and courage; and how he rose to heights of indignant denunciation of sham and falsehood; how he was kindly, generous, vigilant, aggressive and incorruptible—at all times a gentleman, but never ostentatiously conscious of the

fact. These are the qualities that we have lost in our teaching. We have developed—I do not say over-developed—in the teaching of substantive law, but on the side of adjective law in its actual use our methods of teaching are defective. Who can doubt it, who is at all familiar with the bar to-day in the mass, and the bar of yesterday in the mass? Men are lacking in manners, though not in manner; guilty of improprieties and of bad form, offending, not so much wilfully and from lack of principle as from ignorance and lack of instruction. As Mr. Leaming wrote, in his "A Philadelphia Lawyer in the London Courts": "Any one who has sat on a bar committee of censors, in America, must have been struck by the frequent instances where practitioners have fallen into error from sheer ignorance, due to inexperience or to the fact that they had not been born and bred to the best traditions. This is especially true in these days, when law schools are grinding out members of the bar who have had no real professional preceptors." Or, as another member of the bar put it in conversation: "What students need is not so much a knowledge of ethics as practice in ethics, or opportunities to see ethical principles practically applied. Students are incubated instead of hatched. They now have no natural mother."

What is the remedy? I venture a suggestion—not dogmatically, but with some assurance, born of experience as one educated in an office while attending a law school, as an active practitioner for more than forty years, supplemented by twenty years of teaching office students and ten years of teaching in a professor's chair. It is this: As we cannot carry the students back to the offices, we should carry, as far as practicable, the offices to them. This can only be done by one engaged in active practice. Let the chairs of practice be vacated by the pure scholars. Do not let them be filled by retired practitioners or those about to retire. We must guard against atrophy. A man out of practice loses his touch with new remedies and rules. He is too apt to rely on his knowledge of what he once did. The man in practice relies on what he is now doing. Let the chair of practice in each school be filled by an active member of the bar, whose presence in the court room is a familiar presence, and let him teach ethics as he discusses remedies. He will know what he is talking about, and his experience and observation will supply him with practical and actual illustrations. The students will know that he understands what he is talking about. He will be no paper-soldier, but a real man of arms. Let not the scholars be offended. In proportion to their success in teaching substantive law, by an exclusive devotion to study, they have lost their relations to the adjective law. They were able to arraign with justice the old-fashioned preceptor as unfit to teach substantive law in the real sense. They justly laughed at the old professor as but half-baked. In turn, the judges of the courts, the active men at the bar, the men concerned with actual legal warfare, can justly arraign pure scholars as unfit to teach practice and ethics in the real sense. They can trace the history of actions; they can state the theory of actions; they can even furnish the forms of process, but as to an interpretation of them—a living, breathing, translation of them into actual use—they are incapable. They can recite the canons of ethics as they could recite the Ten Commandments, but as to the niceties of occasions in advising clients in the office, in consultations with colleagues, in negotiations with adversaries, in battles in the court room, or in the sheriff's or marshal's rooms—the *carte and tierce* of legal fencing—they are practically helpless.

"If a plaintiff cannot open his case without showing that he has broken the law, courts of justice will not assist him to recover, whatever the equities of his case may be." Clifford, J., dissenting. Burbank *v.* Conard, 96 U. S. 302.

Cases of Interest.

"PRACTICING MEDICINE" AS INCLUDING OSTEOPATHIC TREATMENT.—In Harvey *v.* State (Neb.) 148 N. W. 924, which was an appeal from a judgment convicting the defendant of practicing medicine without a license, it appeared that each count of the information contained this allegation: "Did then and there for remuneration unlawfully practice medicine by unlawfully treating and attempting to heal one (name of patient) for a bodily ailment through the manipulation and adjustment with the hands by the said Earle A. Harvey, of certain nerves, bones and tissues of the body of the said (name of patient) without first having issued to him, the said Earle A. Harvey, by the state board of health of the state of Nebraska, a certificate or license to practice medicine." One of the questions in dispute was whether the information showed that the defendant was "practicing medicine" within the meaning of those words as used in a statute providing as follows: "Any person shall be regarded as practicing medicine within the meaning of this chapter who shall operate on, profess to heal or prescribe for, or otherwise treat any physical or mental ailment of another." The holding of the Supreme Court on the appeal was that the information did show that the defendant was "practicing medicine."

PART PAYMENT OF DEBT BY STRANGER AS ACCORD AND SATISFACTION.—The recent case of Cunningham *v.* Irwin, (Mich.) 148 N. W. 786, while recognizing the general rule of law that a payment of less than the full amount of a part-due, liquidated, and undisputed debt, although accepted and receipted for in full satisfaction, is only to be treated as a payment pro tanto, and does not estop the creditor from suing and recovering the balance, holds that the rule only applies when the payment is made by the debtor and not when it is made by a stranger to the claim and under no legal obligation in relation to it. Judge Steere in a well considered opinion says: "In volume 1 of Ruling Case Law, a work assuming to winnow by a process of judicial and editorial selection the essence and drift of leading decisions, the law upon this question is thus stated, on page 193, § 28: 'The view that such a part payment may so operate is another well-settled exception to the general rule as regards part payments of liquidated demands, and it is settled that if part payment is made by a third person at the request of and with the authority of the debtor, and is received by the creditor in full satisfaction, there is good accord and satisfaction, as the creditor receives a benefit in securing the payment by such third person; otherwise, due to the financial condition of the debtor, he may not have been able to secure payment of any part of the debt.' We are of opinion there is no testimony in this case to sustain the finding that there existed a contract of agency of legal force to defeat the third party exception to the rule plaintiff invokes, that the record conclusively discloses a settlement made with and payment of his own money by a volunteer, third party, a stranger to the demand and under no legal obligations to pay it; that it was by authority of the debtor, was received and receipted for by the creditor in full satisfaction of his claim; and that it operated as a valid accord and satisfaction between the parties to this action."

VALIDITY OF STATUTE FIXING STANDARD OF BUTTER FAT FOR ICE CREAM.—The Supreme Court of Pennsylvania in Com. *v.* Crowl, 91 Atl. 922, held valid as within the police power a statute providing as follows: "No ice cream shall be sold within the state containing less than eight per centum butter fat, except where fruits or nuts are used for the purpose of flavoring, when

it shall not contain less than six per centum butter fat." The appeal was from a judgment of the Superior Court which took the same view, and the opinion of that court was adopted by the Supreme Court. In part the opinion reads as follows: "The purpose of the act was to suppress false pretenses and to secure honest dealing in the sale of an article of food. That ice cream is in general use was admitted; that it is largely composed of milk and cream is shown by the evidence in the case. Its name implies the use of cream in its composition, and all of the authorities to which the learned counsel for the appellant refer show that milk and cream are constituents in its composition. It enters so largely into the food supply of the public as to have become a proper subject of legislation, especially in view of the opportunities which its manufacture affords to practice imposition. In the popular understanding it is largely composed of milk of which butter fat is an important constituent. If by the exercise of ingenuity and by the practice of unwarranted thrift a product can be put on the market having the name and appearance of ice cream, but lacking the chief element which gives it value as an article of food, a large opportunity would be afforded to dealers in that article to profit by deception, and it is the opportunity for such deceit of which the police power takes notice and seeks to take away. It is not necessary that injury has been done or a wrong perpetrated. The possibility that such results may take place warrants legislative intervention under the police power. . . . It is not a successful denial of the exercise of these powers to say that the prohibited article is wholesome and not injurious to the consumer. The wholesomeness of the prohibited thing will render the act unconstitutional. The temptation to fraud and adulteration may be a consideration leading to regulative or prohibitive legislation. If it were not so courts would become the triers of the expediency of such legislation, and the authority which the people committed to the legislature would be transferred by judicial action to the courts."

CONTRIBUTORY NEGLIGENCE OF GUEST IN AUTOMOBILE BEING RUN IN NIGHTTIME WITHOUT LIGHTS.—The general rule that a person injured while riding in an automobile as the guest of the owner or driver, the injury being due to the negligence of a third person, is not barred from an action of damages against such third person by virtue of the fact that the driver was guilty of contributory negligence, as such negligence cannot be imputed to him, is subject to exceptions as is seen from the case of Rebillard *v.* Minneapolis, etc., R. Co., 216 Fed. 503, wherein the facts showed that the plaintiff, while a guest in an automobile which was being run without lights on a dark night over an unfamiliar road, was injured by the automobile's going over an embankment into a railroad cut. The suit was against the railroad company, and the plaintiff was not allowed any relief on the ground that he was guilty of contributory negligence irrespective of defendant's negligence. The court said: "In Little *v.* Hacket, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. ed. 652, which is the leading American case on this subject, and which has been followed by the American courts generally, the rule was established that the contributory negligence of the driver of a public conveyance would not be imputed to a passenger. And this court in Union Pacific Ry. Co. *v.* Lapsley, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800, and City of Winona *v.* Botzet, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204, has extended this rule to a person who accepts a gratuitous invitation of the owner and driver of a vehicle to ride with him, even if it is not a public conveyance. But an examination of the many cases on that question shows that the writers of the opinions are careful to except a passenger or guest who with knowledge of the danger remains in such dangerous position. . . . The plaintiff, as a reasonably prudent person, must have known of the danger incident to riding in a motor car on a dark night, without lights, over roads with which neither the driver of the car, nor any of the persons with him in the car, were familiar. When with full knowledge of that fact the plaintiff remained in the car he was as guilty of negligence as the driver himself."

VALIDITY OF STATUTE PROHIBITING SALE OF OPIUM FOR ANY PURPOSE OTHER THAN "LEGITIMATE USE."—Whether a statute prohibiting the sale of opium for any purpose other than for "legitimate use" was void for uncertainty was one of the questions raised in Com. *v.* Gabhart, (Ky.) 169 S. W. 514, and the answer was that it was not void for that reason. The court in reaching its decision used language as follows: "It is argued that the statute fixes no standard by which the physician in selling or dispensing opium, its alkaloid salts or derivatives, is enabled to know what use of it by the purchaser would or would not be legitimate, and that the indictment, in simply charging in the language of the statute that the sale made by the appellee was for other than a legitimate use of the drug, fails to state an offense under the statute. Authority may be found, even among the decisions of this court, that apparently sustains this contention, but none of them rests upon the precise state of case here presented; and in the recent case of Katzman *v.* Com., 140 Ky. 124, 130 S. W. 990, 30 L. R. A. (N. S.) 519, 140 Am. St. Rep. 359, we had under consideration the validity of section 2630, Kentucky Statutes, which regulates the sale of certain poisons by retail, and declares, in substance, that a sale or delivery of such poisons shall not be made by any person without satisfying himself that the poison is to be used for legitimate purposes, without defining the words 'retail' and 'legitimate purposes.' A prosecution instituted by warrant against Katzman for violating this statute resulted in his conviction, and he sought a reversal of the judgment, upon appeal, on the ground that the statute was void for uncertainty because it failed to define the words 'retail' and 'legitimate purposes.' We held, however, that the statute was not void on either of these grounds. . . . The failure of the statute to define these words does not make it void for uncertainty. The word 'legitimate' in the statute is not used in its original sense of lawful, but in its secondary sense or proper or warranted, as when we speak of a 'legitimate conclusion' or a 'legitimate argument.' Morphine is sold for legitimate purposes under the statute when, under the facts, a druggist or doctor, acting according to the ordinary usage of the profession and exercising ordinary care, would have made the sale. This is a question for the jury, and should be so submitted to them by the instruction of the court."

LIABILITY FOR ALLOWING PIECE OF COAL TO ROLL DOWN MOUNTAIN SIDE INJURING INHABITANT AT FOOT.—In Furkovich *v.* Bingham Coal & Lumber Co., (Utah) 143 Pac. 121, the defendant, a coal company, was sued for the negligence of an employee who while unloading a wagon of coal on a steep mountain side allowed a piece to roll down the mountain. The plaintiff, who lived at the foot of the mountain, was hit by the rolling piece of coal, and received the injury which was the basis of the action. The plaintiff recovered judgment in the court below, which was affirmed on appeal. Judge Frick for the Supreme Court said: "But it is also asserted that the verdict and judgment are erroneous because Davis was not required to foresee the consequences which resulted from the piece of coal rolling down the mountain side. Counsel in that connection contend that, in order to fasten responsibility upon the party charged with negligence, 'it must appear that the result

must have reasonably been foreseen by a person of reasonable care and prudence to be the probable consequences of doing the particular thing in the particular way it was done.' We have had occasion to pass upon the ordinary test of liability respecting consequences flowing from a particular act. In Stone *v.* Railroad, 32 Utah 205, 89 Pac. 722, Mr. Justice Straup states the rule thus: 'But the test of liability is not whether, by the exercise of ordinary prudence, the defendant could or could not have foreseen the precise form in which the injury actually resulted, but he must be held for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act. If the act is one which the party, in the exercise of ordinary care, could have anticipated as likely to result in injury, then he is liable for any injury actually resulting from it, although he could not have anticipated the particular injury which did occur.' A number of cases are there cited and reviewed in support of the doctrine. If we apply the test outlined above, how can appellant escape liability? It would seem that the most ordinary intelligence must have foreseen that if a stone or a large piece of coal should be permitted to roll down a steep mountain side, at the foot of which there are a number of dwellings with people living therein, injury would probably happen to someone."

VALIDITY OF ORDINANCE PROVIDING THAT NO MORE THAN ONE FLOOR OF ANY BASEMENT SHOULD BE USED FOR THE RETAIL SALE OF GOODS.—An unusual ordinance was under consideration in Chicago *v.* Mandel Bros. (Ill.) 106 N. E. 181. The action was by the city of Chicago against Mandel Bros., engaged in the retail sale of goods, and they were charged with the violation of an ordinance in part as follows: "Not more than one floor of any basement or cellar shall be used for the retail sale of goods. Such floor shall be the floor nearest to the inside street grade. Such floor used for the retail sale of goods shall not be more than twenty feet below the inside street grade." The validity of the ordinance was attacked by the defendants, but the court sustained it, as being a proper police regulation. The important portion of the opinion is as follows: "It was shown by the evidence that the building of the defendant in which the violation of the ordinance occurred was of fireproof construction throughout, and was equipped with all of the best safety appliances and sanitary features known in building. The basement was shown to have been constructed by the defendant at great expense, and the number, character, and location of the exits, elevators, fire apparatus and ventilating system were fully shown. It is argued that the ordinance is unreasonable in absolutely prohibiting the retail sale of goods on a floor more than twenty feet below the street grade, without reference to the character of the construction of the basement, its safety equipment and sanitary devices. Other provisions of the ordinance are found in the record, from which it appears that the first twelve stories above the street may be used for the retail sale of goods, and those above the twelfth story if equipped with an approved automatic sprinkler system and having inclosed stairways; and it is argued that the council gave no consideration to the fact that a basement may be made as safe as any floor above the street. This is a question with which the city council had to deal. It is a legislative question, which must be left to the judgment and discretion of the legislative department, and unless the exercise of such judgment and discretion is manifestly unreasonable the courts will not interfere with it. It is not for a court to say that in its judgment the requirements of an ordinance enacted for the promotion of the public safety are too stringent, provided they are adapted to the object sought, and are not manifestly unreasonable. No doubt the council took into consideration the different conditions in the basement and upper floors in regard to fires, the relative danger from explosion, smoke, darkness, water, and falling debris. We cannot say that the difference in conditions is not such as to justify the prohibition complained of in this ordinance."

TRADE NAME "KOKE" AS INFRINGEMENT OF "COCA-COLA."—In Coca-Cola Co. *v.* Branham, 216 Fed. 264, which was a suit in equity to enjoin the defendants from an infringement of the trade name of the plaintiff, and to prevent unfair competition, the following facts appeared: The trade name of plaintiff's product was "Coca-Cola." The defendants prepared and sold a beverage which was called "Koke." Both beverages were made from syrups mixed with carbonated water. Both were put up in bottles, and were also served by the glass at cold drink stands. The bottles containing Koke were a little taller than those containing Coca-Cola. The bottles containing each beverage had a tin cap over the stoppers. The words "Coca-Cola" and "Koke" appeared in script on these tin caps. Coca-Cola and Koke were similar in color. Defendants sold to dealers exclusively. It appeared in testimony that in some instances persons wanting Coca-Cola would say, "Give me a dope," or "Give me a Koke." There was also proof to the effect that two or three dealers gave Koke to their customers when they had called for Coca-Cola. There was no proof that the defendants sold Koke for Coca-Cola, or advised their customers to do so. On these facts the injunction was refused. The important point involved in the case is stated and determined by the court in language as follows: "Plaintiff . . . argues that 'Koke' has become the 'secondary name' of its product, because it appears from the proof that some persons desiring that product say to the dealer, 'Give me a Koke.' A trade name may be acquired by adoption or user. . . . But plaintiff has never used the word 'Koke' in connection with its product. It has taken and used the name Coca-Cola. The use of the word 'Koke,' as applied to the product of plaintiff, has been, so far as the testimony shows, by persons upon their volition without being moved thereto by defendants. If the use of the name had been observed by defendants, and it was afterwards adopted by them with the purpose and intention of taking advantage of that fact and to engage in the manufacture and sale of a beverage and call it 'Koke,' and sell it 'as and for Coca-Cola,' then a case of unfair competition would undoubtedly be made out. Assuming that there is such a thing as a secondary trade name, the right to its exclusive use must depend upon adoption and use, just as in the case of a primary name. There is such a thing as a name having acquired a secondary meaning. Elgin National Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. ed. 365; Bates Mfg. Co. *v.* Bates Numbering Machine Co. (C. C.) 172 Fed. 892. But the facts in this case do not call for an application of that rule. The relief sought here is the prohibition of the use of a name that the defendants have neither adopted nor used. There is nothing to show that the defendants were using the name for the purpose of selling the beverage manufactured by them for Coca-Cola."

LIABILITY OF RAILROAD FOR LOSS OF SUIT CASE TAKEN BY CAR PORTER AT PLAINTIFF'S DESTINATION.—The liability of a railroad company for the loss of a suit case owned by a passenger occupying a chair in a parlor car and carried by him into that car was the question in dispute in Union Pac. R. Co. *v.* Grace, (Wyo.) 143 Pac. 353. The passenger, the plaintiff in the action, sought to hold the carrier liable as an insurer on the

ground that the loss occurred after he had reached his destination and had put the suit case into the hands of the car porter. The lower court took this view and rendered a judgment for the plaintiff. This was reversed on appeal on the ground that the carrier was at most but a bailee, since the car porter was under no obligation to take the suit case, and further that the evidence did not show that he was negligent. The court said: "It was admitted on the trial that, if present, Mayweather [the porter] would testify that he was not authorized to receive baggage for and on behalf of defendant, and that he did not receive the suit case as baggage for and on its behalf. The only evidence of his authority or of any custom established or permitted by the defendant authorizing him to do so was the testimony of plaintiff that on this occasion he carried our suit cases in, and looked after the passengers in general as porters do on trains; that he was the only person on the car to look after the passengers; and that plaintiff supposed he was a porter. But assuming the evidence sufficient to establish the fact that he was a porter on the car for whose acts in relation to passengers' hand baggage the defendant was responsible, the question still remains, was he negligent in doing what he did? When the train arrived at Cheyenne he assisted the passengers, including plaintiff, by carrying their hand baggage from their respective seats in the car to the vestibule at the end of the car at which they made their exit, and placed the baggage there. It is apparent that he could not have given any particular piece of baggage his undivided attention; and it is probable that plaintiff's suit case was taken by some one else in passing through the vestibule on leaving the train. To hold the defendant liable for the loss of the suit case in this case would in effect be a holding that it was an insurer, which it was not. Ordinary care did not require the defendant to see to it that no passenger took from the car other baggage than his own. It was so held in Springer *v.* Pullman Co., 234 Pa. St. 172, 83 Atl. 98. 'To so hold would be to impose on the company the duty of seeing that no passenger left the car with any baggage except his own, which again would be virtually making the carrier an insurer, besides subjecting the passengers to a scrutiny and surveillance which the ordinary traveler would have a right to resent. We cannot think that the ordinary care exacted of the carrier requires any such officious interference as this.' There is no evidence in the present case showing or tending to show that the care taken of the suit case by Mayweather was not such as is usually and ordinarily taken of such property under similar circumstances. It may be that, in the absence of any evidence as to the care taken of the property while in the possession of a bailee, the proof of its loss creates an inference of negligence; but when it is made to appear what care was taken, and it is not shown that such care was not reasonable care, no such inference can be indulged in. We have not deemed it necessary to determine whether the defendant was a gratuitous or an ordinary bailee, as in our opinion the evidence is insufficient to warrant the conclusion that reasonable and ordinary care was not exercised in this instance."

"PLACE OF RESORT" IN LIQUOR LAW AS INCLUDING PRIVATE CLUB.—The Cumberland Club of Portland, Maine, without doubt the leading club in that state, has been declared a "place of resort," and therefore a common nuisance within the meaning of a statute providing as follows: "All places of resort where intoxicating liquors are kept, sold, given away, drank or dispensed in any manner not provided by law, are common nuisances." The case which bears the title of State *v.* Cumberland Club, 91 Atl. 911, shows that there was no bar in the clubhouse, but members had lockers, and kept liquors therein. The court, speaking through Chief Justice Savage, in commenting on the statute used language as follows: "The defendant contends that the clubhouse, in legal contemplation, was not a place of resort, for two principal reasons: First. Because it is not a public place to which the public generally resorted or had a right to resort. And, secondly, because the members who actually did go to the place by virtue of their membership essentially owned the place; that they used it as members, but did not in legal meaning resort to it. . . . We think neither ground is tenable. It is unnecessary to discuss the fine distinctions suggested by counsel. In the statute there are no such limitations upon the meaning of the phrase 'place of resort' as counsel seeks to incorporate. The statute is clear and plain. It does not say 'all places of public resort.' It says 'all places of resort.' It does not say 'all places of resort, except those to which admission is limited to members of the corporation keeping them.' It says 'all places of resort.' It would be a perversion of terms to say that a clubhouse is not a place of resort merely because it was resorted to only by members of the club owning and maintaining it. What is a club? Why is a club formed and maintained but to furnish a common meeting ground to which the members may resort? Words in the statute are to be taken in their common and popular sense, unless the context shows the contrary. If a clubhouse is not a place of resort in the ordinary acceptation of the term, it is difficult to conceive what can be. To constitute a place of resort it is not necessary that it be open to every one. It is enough if it be resorted to by a limited class, as for instance, the members of a club, or by certain individuals not constituting a class. The defendant clubhouse was a place of resort, not only with respect to the persons who resorted there, but also with regard to the manner and frequency of their resorting there. . . . The evils which it seems this statute seeks to remedy are not those of merely drinking or giving away of intoxicating liquors. They are rather the evils which may follow from drinking or giving away liquors at a place of resort, to which men commonly and habitually resort, where men socially inclined are apt to congregate for that purpose. If each member of this club drank his own liquor and only his own, the clubhouse would still be a place of resort where intoxicating liquor was drunk. But the universal conduct of men under such circumstances goes to show that ordinarily drinking at such a place is not so limited. The court are of opinion that the facts agreed upon describe a statutory nuisance."

New Books.

Cyclopedia of American Government. Edited by Andrew C. McLaughlin, Professor of History, University of Chicago, and Albert Bushnell Hart, Professor of the Science of Government, Harvard University. Vol. II. Finance—Presentment; Vol. III. President—Yukon. New York and London: D. Appleton & Co. 1914.

The first volume of the Cyclopedia of American Government was reviewed in these columns several months ago, at which time we warmly commended the work. Since then the remaining volumes, two in number, have been published. These measure up to the high standard set by the first, and lead to the conclusion that their use should be extensive; for the field is new, and the subjects covered are of vital importance to a nation having a republican form of government. While in a sense a reference work, one interested in governmental questions

can easily become sufficiently absorbed to read it from cover to cover. The various subjects, however small they may be, are signed, and the signatures show that leading specialists have contributed to its pages. Professor Hart, one of the editors, has himself been a generous contributor, and whatever he writes is bound to interest and instruct. The third volume contains an adequate index, and all are attractive to the eye, and of convenient size.

Where the People Rule; or the Initiative and Referendum, Direct Primary Law, and the Recall in Use in the State of Oregon. By Gilbert L. Hedges, B.A., LL.B. San Francisco: Bender-Moss Company. 1914.

The purpose of the volume at hand is to show what the Initiative and Referendum, Direct Primary Law, and the Recall are, how they operate, and what results have been obtained by their use. This the author has succeeded in doing to our satisfaction. Various instances are cited where the laws have been applied; but the most interesting portion of the book to one who has given some thought to such laws is the conclusion the author arrives at, which is to the effect that the fundamental principle that voting is a privilege and not a duty, which we recognize under the system that has been in vogue for a century in the United States, must be changed if the initiative and referendum is to fulfil its mission. Commenting generally on the three laws which have so stirred the voters in the past two years Mr. Hedges says: "The initiative and referendum, direct primary law and the recall in use in the State of Oregon have not yet been fully tried out. Any criticism of these measures must be with the understanding that they are yet in their infancy, and what the future holds in store for the citizens of the State of Oregon, no man can tell. This is certain: the people believe they have taken a long step forward in an attempt to make their State government more responsive to the popular will. They cannot now retreat if they would, nor do they care to." It is clear from a careful examination of the contents of the book that the laws considered, while having in them much good, are still somewhat experimental, although they show a groping after better government.

The Doctrine of Judicial Review: Its Legal and Historical Basis, and Other Essays. By Edward S. Corwin, of the Department of History and Politics, Princeton University. Princeton: Princeton University Press. 1914. $1.25 net.

Mr. Corwin is a thoughtful writer, as his volume shows. Its contents are made up of the following chapters: "Marbury *v.* Madison and the Doctrine of Judicial Review," "We, the People," "The Pelatiah Webster Myth." "The Dred Scott Decision" and "Some Possibilities in the Way of Treaty-Making." The author in his preface gives his reasons for the volume as follows: "In the preparation of another volume, not yet published, I have encountered a number of questions involving controversies important to the student of American Constitutional History, an extended consideration of which however in those pages I felt to be out of place. The following studies present my conclusions with regard to these questions, and the grounds of them. In the principal essay I have endeavored to present judicial review as the outcome of a view of legislative power which arose in consequence of the astonishing abuse of their powers by the early State legislatures but which was first appreciated for its full worth by the Convention that framed the Constitution of the United States. Incidentally I have, I trust, laid to rest that most inconclusive 'explanation' of judicial review which dwells on the idea that a legislative measure contrary to the Constitution is not law and never was. The alleged explanation totally ignores the crucial question, which is, Why is it the judicial view of the Constitution that legislative measures have to conform to? The article on the Dred Scott Decision treats of the most dramatic episode in the history of judicial review, though one that is by no means the best illustrative of the spirit of the institution. The study entitled 'We, the People,' approaches the time-honored controversy over Secession and Nullification from what is shown to be, I submit, the point of view of 1787. But the verdict arrived at with reference to the rights of the States in relation to the Constitution is not without import for some present-day issues, as is shown in the paper on Some Possibilities of Treaty-Making. The paper on the Pelatiah Webster Myth deals with a question of less practical significance, but yet one of real ethical importance. For if history has any function to perform it is that of endeavoring at least to make correct assessment of the motives and services of men."

While much of the field covered by Mr. Corwin is not new, yet it is fruitful, and his conclusions are entitled to careful consideration bearing as they do the earmarks of study and reflection.

Legal Laughs. A Joke for Every Jury. By Gus C. Edwards. Clarkesville, Georgia: Legal Publishing Co. 1914. $2.50 delivered.

This is a collection of anecdotes, numbering over one thousand, dealing with law, lawyers and legal proceedings. They are classified by subjects, and the whole is indexed. The production is a compilation, being the result of patient and discriminating clipping by the editor, extending over several years. While at first blush it might seem from this that the anecdotes gathered together must be somewhat stale and in the Joe Miller class, an examination of the book will satisfy anyone but the insatiate joke gatherer that his first thought needs revision, and that he really has before him a large assortment of seemingly fresh anecdotes. Our opinion is that the material gathered together by Mr. Edwards is clean, wholesome and entertaining, and well worth perusing.

The New Slavery. By H. Percy Scott, M.A. Toronto: William Briggs. 1914.

Mr. Scott in his preface comments on the fact that President Woodrow Wilson wrote "The New Freedom" in order to show the people of the United States how to escape from intolerable conditions, and that he has written "The New Slavery" in order to show the people of Canada how they have gotten into intolerable conditions, and also the way out. In the opinion of the author the reason for the alleged intolerable conditions in Canada is the high cost of living resulting from combines and monopolies, and the way pointed out to remedy such conditions is the breaking up of the monopolies by the enforcement of laws affecting the people's rights which he says have stood the test of centuries. Mr. Scott musters considerable evidence to support his claim that the intolerable conditions exist, and we trust that what he has written will help to free his countrymen from the alleged bondage.

The Spirit's Work. By J. H. Montgomery, Brookline, Boston: The Riverdale Press. 1914.

Mr. Montgomery is a lawyer living in Camden, Maine, and his versatility has shown itself in the production of this book of verse. Having had the good fortune to visit Camden at various times we can well understand why a native of that town living always in sight of the lovely Camden hills and beautiful Penobscot bay should be impelled to express himself in verse. While Mr. Montgomery's vocation is that of a lawyer it must not be understood that his verses are concerned with the law. In fact there is very little in his book to indicate that he has pursued

that exacting science. His subjects relate to incidents arising about him and have a local flavor. While this little volume is hardly likely to appeal to the world at large on account of this fact, we fancy that a smaller circle will find occasion to enjoy it.

News of the Profession.

LAW EXAMINER NAMED.—Attorney J. W. Watts of Dixon has been named by the Supreme Court as one of the law examiners of the state of Illinois.

NEW PROFESSOR FOR UNIVERSITY OF TEXAS.—Geo. C. Butte, of Houston, has been elected associate professor of law in the University of Texas.

CHOSEN DEAN OF LAW SCHOOL.—Judge A. C. Troup of the Nebraska District Court, has been chosen dean of the Law School of the University of Omaha.

COMMERCIAL LAW LEAGUE.—The executive committee of the Commercial Law League has decided to hold next year's convention of the League at Pasadena, Cal.

NAMED FOR LAW SCHOOL FACULTY.—Philip Weltner of Atlanta has succeeded Elliott E. Cheatham as professor of common law pleading in the Atlanta Law School.

APPOINTED LAW SCHOOL PROFESSOR.—William Cullen Burns, a Chicago attorney, has been appointed a regular professor of law in Washburn (Kan.) Law School.

MADE ASSISTANT FEDERAL ATTORNEY.—Thomas F. Smith of Jacksonville has been appointed second assistant United States district attorney at Springfield, Ill.

LAW PROFESSOR RESIGNS.—Ralph T. Baker has resigned his assistant professorship of law at the University of Pennsylvania to enter the general practice of law at Harrisburg.

APPOINTED COUNTY JUDGE.—Joe E. Webb of Madisonville has been appointed county judge of Madison county, Texas, to fill the vacancy caused by the resignation of Judge W. W. Sharp.

APPOINTED TO DISTRICT OF COLUMBIA BENCH.—President Wilson has appointed Frederick L. Siddons of Washington, D. C., associate justice of the Supreme Court of the District of Columbia.

ATTORNEY FOR FEDERAL RESERVE BANK.—Charles L. Powell, a member of one of the leading law firms of Chicago, has been appointed attorney for the federal reserve bank of the Chicago district.

TEXAS COUNTY COURT VACANCY FILLED.—W. M. Weatherred of Coleman has been appointed to the bench of the County Court of Coleman county, Texas, to fill the vacancy caused by the death of Judge F. M. Bowen.

NAMED DISTRICT ATTORNEY IN TEXAS.—John W. Moyers of Mineral Wells has been appointed by Governor Colquitt of Texas to the office of district attorney for the twenty-ninth judicial district, succeeding Judge Hiner, resigned.

THE NEBRASKA STATE BAR ASSOCIATION will hold its annual meeting at Lincoln, Neb., on December 28 and 29. It is anticipated that Frank Irvine, former professor of law at the Nebraska Law School and dean of the Law Department of Cornell University will deliver the principal address.

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, at its recent annual convention, elected the following officers: President, Attorney General J. T. Barker, of Missouri; vice-president, Attorney General James Tuttle, of New Hampshire; secretary and treasurer, Assistant Attorney General Martin, of Alabama.

NEW CHIEF CONSUL FOR NETHERLANDS.—John Vennema, a Chicago lawyer, has been appointed by the government of the Netherlands as its consul general at Chicago, for the territory embracing the states of Illinois, Wisconsin, Nebraska, North Dakota, South Dakota, Idaho, Wyoming and Montana.

TO BE ASSISTANT ATTORNEY GENERAL.—Elliott E. Cheatham, a well-known lawyer of Atlanta and one of the professors at the Atlanta Law School, has been appointed an assistant United States attorney general. Mr. Cheatham is the fourth member of the faculty of the Atlanta Law School to be appointed to federal office during the present administration.

FORMER CHIEF JUSTICE OF TEXAS DEAD.—Judge Reuben R. Gaines, former Chief Justice of the Texas Supreme Court, died at Austin, Tex., on October 13, aged 78. Judge Gaines served the state of Texas in a judicial capacity for thirty-five years—nine years as district judge, nine years as associate justice of the Supreme Court, and seventeen years as chief justice of the Supreme Court, resigning from the bench in 1911 on account of failing health.

OFFICERS OF AMERICAN BAR ASSOCIATION.—Peter W. Meldrim, of Savannah, Ga., was elected President of the American Bar Association at its recent annual meeting in Washington, D. C. Other officers elected were as follows: Secretary—George Whitelock, Baltimore, Md.; treasurer—Frederick E. Wadhams, Albany, N. Y.; executive committee—William H. Burges, El Paso, Tex.; William H. Staake, Philadelphia, Pa.; William C. Niblick, Chicago, Ill.; John H. Voorhees, Sioux Falls, S. D.; Selden P. Spencer, St. Louis, Mo.; William P. Bynum, Greensboro, N. C.; Chapin Brown, Washington, D. C.

MASSACHUSETTS BAR ASSOCIATION.—At the annual meeting of the Massachusetts Bar Association, held at Worcester, Mass., on October 9 and 10, the following officers were elected for the ensuing year: President, Herbert Parker; vice-presidents, William H. Brooks, James E. Cotter, Samuel K. Hamilton, Robert O. Harris and Joseph B. Warner; secretary, James A. Lowell; treasurer, Charles H. Beckwith; executive committee, Charles Neal Barney, William A. Burns, James B. Carroll, Henry V. Cunningham, William A. Davenport, Frank F. Dresser, David A. Ellis, Frederick B. Greenhalge, Frederick S. Hall, Robert Homans, Gardner K. Hudson, James F. Jackson, Melvin M. Johnson, Thomas J. Kenny, Henry C. Mulligan, Oliver Prescott, John H. Schoonmaker, Ezra R. Thayer, Charles E. Ware, John J. Winn and Sidney R. Wrightington.

DEATHS.—The following recent deaths of prominent members of the profession have been noted: Oct. 6, at Mt. Auburn, O., Hiram D. Peck, aged 70, former judge of the Ohio Superior Court; Oct. 7, at Yonkers, N. Y., Richard L. Hand, aged 75, formerly President of the New York State Bar Association; Oct. 9, at Woodland, Cal., E. R. Bush, aged 68, former Superior Court judge of Yolo County, Cal.; Oct. 11, at Ottumwa, Ia., Frank W. Eichelberger, aged 73, former judge of the Iowa Circuit Court; Oct. 13, at Buck Hill Falls, Pa., William N. Ashman, aged 75, for more than thirty years judge of the Orphans' Court of Philadelphia; Oct. 19, at Coleman, Tex., F. M. Bowen, aged 66, former county judge of Coleman county, Texas; Oct. 20, at New York city, Edward A. Amend, aged 56, justice of

the Supreme Court of New York; Oct. 20, at Joliet, Ill., A. O. Marshall, aged 74, former judge of the Illinois circuit court; Oct. 20, at Enfield, Ill., John N. Wilson, aged 77, former county judge of White County, Ill.; Oct. 26, at St. Louis, Mo., Thomas James Clark Fagg, aged 93, former judge of the Supreme Court of Missouri; Oct. 28, at Temple, Tex., John M. Furman, formerly judge of the Texas District Court; Oct. 28, at Evington, Va., E. D. Saunders, for many years dean of the law department of Tulane University and formerly judge of the United States District Court; Oct. 29, at Pasadena, Cal., Thomas C. Bach, formerly judge of the District Court and of the territorial Supreme Court of Montana; Oct. 30, at Portland, Ore., Dan R. Murphy, aged 54, former United States district attorney for Oregon; Oct. 31, at Center, Tex., Tom C. Davis, formerly judge of the Texas District Court; Oct. 31, at Chicago, Ill., Lysander Hill, aged 80, former judge of the Illinois Circuit Court; Nov. 1, at Sayler Park, O., John N. Sayler, aged 73, former judge of the Cincinnati Superior Court and of the Ohio Court of Common Pleas; Nov. 7, at Easton, Pa., Henry W. Scott, aged 68, President Judge of Northampton County, Pa.

English Notes.

INCREASING NUMBER OF KING'S COUNSEL.—No one can have failed to observe the continuous growth in bulk of the Law List, an increase noticeable alike in the sections devoted to members of the Bar and to members of the other branch of the Profession. Like the other parts of the book, the pages devoted to recording the names of King's Counsel show the same tendency to expansion. In the Law List for the present year the list of King's Counsel—including, it is true, the names of County Court judges and other official personages who are silks—comes to slightly over three hundred, and now there is announced the creation of a fresh batch of K. C.s. One hundred years ago the K. C.s numbered exactly twenty-four.

ALIEN ENEMY AS DEFENDANT.—In a considered judgment Mr. Justice Bailhache has dealt recently with the difficult questions whether an alien enemy can be sued in England during the war and whether he can appear by counsel and defend the suit. It is clear that an alien enemy cannot sue, but to hold that a right of suit against an alien enemy is suspended would be to favor the enemy and injure the British subject, and to defeat the object and reason of the suspensory rule where an alien enemy sues. The learned judge was therefore of opinion that war does not suspend an action against a defendant who is an alien enemy, and therefore, as a necessary corollary to this, that such a defendant could appear to defend either personally or by counsel. His reason for arriving at this latter conclusion seems clearly sound, for to allow the action to proceed and to deny a defendant a right to be heard "would be opposed to the fundamental principle of justice," and "no state of war could demand or justify the condemnation by a civil court of a man unheard."

PRIVILEGES ACCORDED TO FOREIGN AMBASSADOR.—The announcement of a new biography of Albert Gallatin, the American diplomatist who negotiated the Peace of Ghent a hundred years ago, recalls the interest that was excited in juristic circles by the incident which occurred during his tenure of the office of United States Minister to England in 1827, involving a question of diplomatic privileges. The incident is referred to in all the text-books on international law as the case of Mr. Gallatin's coachman. The question was whether the coachman, who had committed an assault, could legally be, as he in fact was, arrested in the stable belonging to the embassy, or whether, as a servant of the ambassador, he was exempt from prosecution. The British Foreign Office took the view, in this respect differing from the usage of most countries, that the mere servants of an ambassador are not exempt from arrest upon criminal charges, and, further, that the premises occupied by a foreign minister are not regarded by English law as inviolable. It was admitted, however, that as a matter of courtesy the house of a minister should not be entered without permission being first solicited in cases where no urgency pressed for the immediate capture of an offender, and, therefore, that the magistrates should have informed Mr. Gallatin of the issuing of the warrant of arrest before any attempt was made to execute it, in order that the minister's convenience might be consulted as to the time and manner in which the warrant should be executed.

RESCUED SAILORS.—The British sailors rescued from the three cruisers, H. M. S. *Aboukir, Hogue,* and *Cressy,* sunk by German submarines and brought to Holland in a Dutch trawler which rescued them, will, in accordance with the principles of international morality, be regarded as absolutely free, and the British Legation at The Hague has been informed that they will leave for England shortly. If these men had been rescued by a neutral warship instead of a neutral merchantman, their treatment would have been different. At the beginning of the Russo-Japanese War in February, 1904, the British cruiser *Talbot,* the French *Pascal,* and the Italian *Ellen,* rescued large numbers of the crews of disabled Russian ships which had been defeated by the Japanese fleet and had returned to Chemulpo crowded with wounded. The Japanese demanded that the neutral ships should give up the rescued men as prisoners of war, but the neutral commanders demurred, and an arrangement was made according to which the rescued men were handed over to the Russians under the condition that they should not take part in hostilities during the war. The second Peace Conference at The Hague in 1907 has settled the question. Art. 13 of Convention X. enacts: "If wounded, sick, or shipwrecked men are taken on board a neutral man-of-war, precaution must be taken, so far as possible, that they do not again take part in the operations of the war." Neutral merchantmen, as distinguished from neutral men-of-war, can either of their own accord have rescued wounded, sick, or shipwrecked men, or they can have taken them on board on appeal by belligerent men-of-war. The surrender of these men may, according to art. 12 of Convention X., be demanded at any time by any belligerent man-of-war. But if such be not made and the men be brought into a neutral port, as in the case of the sailors rescued by the Dutch trawler, they must not be detained by the neutral concerned.

JUDICIAL TRIBUTES TO SIR WALTER SCOTT.—Lord Hermand, the old Scots judge of whom Mr. W. Forbes Gray has much that is interesting to recall in his recently published Some Old Scots Judges, was the hero of one incident which must have greatly delighted the heart of Sir Walter Scott—the incident, namely, when Hermand, whose love of Guy Mannering, with its quaint pictures of the old legal life of Edinburgh, was unbounded, one day, while on the bench, fairly plucked the volume from his pocket, and, in spite of the remonstrances of all his brethren, insisted upon reading aloud a long passage for their edification. During the whole scene, as Lockhart tells us in Peter's Letters to his Kinsfolk, Scott was present, seated, in his official capacity, close under the judge. This, by the way, was not the only

occasion when Scott's work as a novelist was referred to on the bench of the Court of Session in his presence. In 1828, in the case of Thom *v.* Black (7 Shaw & Dunlop, 158)—a case dealing with what Peter Peebles called "fugie warrants," i. e., the warrant for arresting a person *meditatione fugæ*—Lord Gillies, in discussing the Scots law of imprisonment, said that before a person could be arrested for debt "the debtor must be declared a rebel, and it is only as a rebel that he can be imprisoned. The law on this subject cannot be better expressed than it is by Monkbarns in a work of fiction with which we are all well acquainted." To this statement the reporter appends a long extract from chapter 39 of The Antiquary, in which Oldbuck explains, for the benefit of his nephew Hector and Edie Ochiltree, the intricacies of the Scots law on the subject. Delighted Scott must have been, but possibly also slightly embarrassed, by these judicial tributes to his genius. Critical students of many works of fiction have frequently been able to discover flaws in their discussion of legal problems. It would be interesting to know if anyone has succeeded in successfully impugning Sir Walter's law in any of his numerous volumes.

ENFORCEMENT OF TREATIES.—Mr. Roosevelt, the ex-President of the United States, in his first article in the New York *Times* dealing with the lessons the people of the United States should learn from the war, speaks with exquisite directness of language on the absence of power to enforce treaties, says the *Law Times*. "The first lesson," writes Mr. Roosevelt, "is the absolute need of our being willing, ready, and able to defend ourselves against an unjust attack. What has befallen Belgium and Luxemburg shows the utter helplessness of trusting to any treaties unless they are backed by sufficient power to secure their enforcement." The highest authorities on international law are constrained to admit the absence of a great degree of external power for the enforcement of rules of international conduct. Professor Oppenheim having defined law to be a body of rules for human conduct within a community, which by common consent of this community shall be enforced by external power, says: "In the necessary absence of a central authority for the enforcement of the rules of the law of nations, the states have to take the law into their own hands. Self-help and intervention on the part of other states which sympathize with the wronged one are the means by which the rules of the law of nations can be and actually are enforced. It is true that these means have many disadvantages, but they are means which have the character of external power. Compared with municipal law and the means at disposal for its enforcement, the law of nations is certainly the weaker of the two." He proceeds: "Violations of this law are certainly frequent. But the offenders always try to prove that their acts do not contain a violation, and that they have a right to act as they do according to the law of nations, or, at least, that no act of the law of nations is against their right. Has a state ever confessed that it was going to break the law of nations or that it ever did so? The fact is that states in breaking the law of nations never deny its existence, but recognize its existence through the endeavor to interpret the law of nations in a way favorable to their own act."

REVIVAL OF DEBT BY UNDISCHARGED BANKRUPT.—The decision of the Exchequer Division in Jakeman *v.* Cook (4 Ex. Div. 26) is an authority for the proposition—which at one time was regarded as a somewhat doubtful one under the Bankruptcy Act 1869—that where a bankrupt, after having obtained his discharge, promises for a new and valuable consideration to pay a debt which has been released by the discharge, an action will lie against him for the amount of the debt. That case, together with Re Aylmer; Ex parte Crane (70 L. T. Rep. 244), was followed not long ago by the Court of Appeal in Re Bonacina; Le Brasseur *v.* Bonacina (107 L. T. Rep. 498; (1912) 2 Ch. 394). In the recent case of Wild *v.* Tucker (111 L. T. Rep. 250) the validity of a similar promise by a bankrupt before obtaining his discharge came before the court. And Mr. Justice Atkin reserved his judgment in that case for the purpose of considering this important question: Whether an agreement by an undischarged bankrupt for good consideration to revive the liability for a debt which was provable at the time of the bankruptcy, but was not then proved, is void as being contrary to the spirit of the Bankruptcy Acts and as being against public policy. The authority that is apparently nearest in point among those which were cited to the learned judge is Ex parte Barrow; Re Andrews (45 L. T. Rep. 197; 18 Ch. Div. 464). For there it was held that after registration of composition resolutions, and before completion of the composition, the debtor could not enter into a valid agreement with a creditor bound by the resolutions to pay him his debt in full, even though the agreement was made for valuable consideration, because it would be inconsistent with the equality of treatment of all the creditors. Mr. Justice Atkin, however, was of opinion that that case, when examined, was not an authority in favor of the bankrupt in the present case, for the reasons which his lordship gave in his written judgment. And he was not prepared, he said, "in the absence of express authority, to involve public policy in a new form to invalidate a contract between two business men of full capacity." Public policy, "that very unruly horse which once you get astride of you never know where it will carry you" —as it was styled by Mr. Justice Burrough in Richardson *v.* Mellish (2 Bing. 229, at p. 252), a description that was adopted and approved by Lord Esher, M. R., in Cleaver *v.* Mutual Reserve Fund Life Association (66 L. T. Rep. 220; (1892) 1 Q. B. 147)—has much to answer for. But as far back as the year 1845, that policy was not allowed to prevail in Kirkpatrick *v.* Tattersall (13 M. & W. 766). There it was held by Baron Parke, in delivering the judgment of the Court of Exchequer, that a promise made by a bankrupt after his adjudication, but before he was discharged, that he would, after he had obtained his discharge, personally pay a debt provable in the bankruptcy, was not invalid. There is no difference in point of law, it was laid down, between such a promise made before and after the discharge, provided that it is a promise to pay personally and not out of the bankrupt's estate. Mr. Justice Atkin had, therefore, the view expressed by the Court of Exchequer to back his own opinion. And public policy which, continuing the words of Mr. Justice Burrough above referred to, "may lead you from sound law" was not permitted to bring about that evil result in the present case.

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Obiter Dicta.

A FORECAST.—People *v.* Kaiser, 157 N. Y. App. Div. 78.

A PISCATORIAL STRUGGLE.—Fish *v.* Fisher, 2 Johns. Cas. (N. Y.) 89.

WANTED HIS SHARE.—Share *v.* Coats, 29 S. Dak. 603, was an action by A. Share to recover commissions on a sale of land.

WHAT DOES IT MEAN?—"When the end is conceded, the means of arriving at it are granted."—See Cole *v.* Executors, 7 Martin N. S. (La.) 41.

A STARTLING STATEMENT.—"The distinction between personalty and realty having been abolished, a general residuary clause will carry a lapsed devise of realty as well as a bequest of personalty."—See third paragraph of syllabus to Galloway *v.* Darby, 151 S. W. 1014.

A REFLECTION ON THE HOUSE OF LORDS.—"I might have stated that my personal opinion had not been weakened by the substantial agreement with my views to be found in the judgments of the majority of the House of Lords in Allen *v.* Flood [1898] App. Cas. 1."—Per Holmes, C. J., in Plant *v.* Woods, 176 Mass. 504.

JUST A SYLLABUS.—"Indorsing on an order for publication of a summons by the clerk his name, but not signing at the foot, where it was intended he should sign, does not make the order valid, nor does signing the order at the foot after publication." See Du Bose *v.* Du Bose, 90 S. Car. 87.

THE ORIGIN OF GUARD RAILS.—"That the absence of a guard or rail is reprehensible, in certain contingencies, was a fixed idea in very ancient times in the East where people in the cool of the night habitually slept on their housetops. 'When thou buildest a new house, then thou shalt make a battlement for thy roof, that thou bring not blood upon thine house, if any man fall from thence.' [Deut. xxii : 8.] The modern idea of the necessity of guard rails on sidewalks along deep excavations may take root in that venerable law of Moses, for all I know." Per Lamm, J., in Benton *v.* St. Louis, 248 Mo. 108.

A BIT OF IRISH HUMOR.—At a recent hearing in one of the petty sessions courts of Ireland the charge was "drunk and disorderly." A new justice was on the bench who was particularly insistent that an alleged statement or admission by the accused person should be recounted in the exact words. The following dialogue occurred: The constable: "When I arrested the accused he admitted he was drunk." The justice: "Tell me what he said; give me his own words." Constable: "He said he was drunk." The justice: "But did he not say, I am drunk?" Constable: "No, he never mentioned your worship's name at all." The new justice forthwith desisted.

JUDICIAL NOTICE OUT OF DATE.—In Curry *v.* District of Columbia, 14 App. Cas. (D. C.) 444, the court said: "It may not be improper to take judicial notice of the fact that whatever service the Pennsylvania Railroad Company, which, it is conceded, dominates and controls the other two railroad companies that have been mentioned, has heretofore undertaken to render to the public, it has performed such service with eminent satisfaction; and we are therefore justified in assuming that the service proposed to be rendered in this case under the same auspices will likewise be rendered with entire satisfaction to the public." It may be remarked that the foregoing was written twenty-five years ago. Nowadays, no railroad renders service to the satisfaction of anybody.

A NEW FORM OF CAVEAT.—The following paper was found not long since in the files of the Huntington (Ind.) Circuit Court:

State of Indiana
Huntington County ss
In the Huntington Circuit Court
April term, 1913
Matter in the Estate of
Ida B. Watters, dec'd.
To Hon. Samuel E. Cook;—
Judge of this Court

We are protesting against the appointment and confirmation of Letters to B. F. Watters as Executor of the Last Will (or so called will) of Ida B. Watters, as such will is bogus and was procured under conditions which will not stand the test.

We therefore ask that the matter be held in abeyance for a little time until the business can be presented in due form.

ERWIN WESLEY WATTERS
ORVILLE DAVID WATTERS
RUTH MARIE WATTERS
minors
by I. B. WIKE Guardian
by The BRANYANS
Attys for Guardian.

PROPER CONDUCT ON THE BENCH.—In Musselman *v.* Musselman, 44 Ind. 107, the appellant assigned a number of errors committed at the trial as ground for reversal of the judgment below. Two of the alleged grounds for a new trial, and the comments of the appellate court with respect thereto, were as follows: "'18. The court erred in smoking, and permitting Hon. D. D. Pratt and other attorneys to smoke, in open court and during the trial of said cause, by which plaintiff was prevented from having a fair trial.' The above does not deserve much consideration. It does not appear that the appellant objected to smoking in court, or that it had any injurious effect upon him. We cannot see how smoking in court prevented him from having a fair trial. '19. The court erred in sleeping, or sitting with his eyes closed, in open court, during the reading of the written evidence upon the part of the plaintiff, in said cause, at the trial of said cause, by which the plaintiff was prevented from having a fair trial.' The above reason for a new trial is very vague and indefinite. If the appellant, who was personally present in the court, was unable to determine whether the judge was really asleep or only had his eyes closed, how are we to determine? It is said to have occurred while the appellant was reading his written evidence. If he had reason to suppose that the judge was indulging in a gentle doze after dinner, he should have suspended his reading, or awakened the judge. Nor does it appear what portion of the written evidence was being read. There was much of it wholly immaterial and irrelevant. We might reasonably conclude that the judge but imitated the example of many of the profoundest thinkers and most distinguished judges, and closed his eyes that he might hear the more accurately and more fully comprehend what he heard."

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Law Notes

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The New Year.

WITH this first issue of LAW NOTES for 1915 go our sincere wishes to the members of the legal profession for a happy and prosperous New Year. We confess that a New Year's greeting from a staid law journal is a thing that is somewhat aside from the beaten track of such publications. By the same token our greeting may not be considered a merely perfunctory one. A word of encouragement and cheer to our lawyer readers seems not untimely in view of the paralysis that has fallen upon the business world due to the great European war. There is a prevalent notion that lawyers thrive upon the misfortunes of others: that the chief source of their income is the flotsam and jetsam of trade and industrial wreckage. This is hardly a half-truth, as lawyers themselves well know. It is true that there is an increase of a certain kind of legal work during times of commercial stress and strain, and that at such times a few lawyers, acting in the capacity of legal undertakers, are in at the death of business enterprises, and gather a certain spoil therefrom. But the rank and file of the bar feel equally with men in business the pinch of panic times, and are as vitally interested in the return of normal business conditions. It is natural that this should be so, and the reasons therefor are so obvious that it is unnecessary to labor the question. The law business has undoubtedly been adversely affected by the general business depression of the past few months. Not yet has the business sky cleared. But there are rifts of light in the dark clouds which give promise of fairer weather. It cannot be said that there is any prospect of an early termination of the great war. But the business world is gradually adjusting itself to the existence of the war and preparing to meet the opportunities as well as the emergencies that it has created. In this country we are at peace, and there is every indication that we shall remain so. While they are killing and destroying in Europe we shall be engaged in the more profitable employment of producing and selling. And it is fair to suppose that we shall reap the legitimate rewards of our good behavior. Accordingly, we feel that we may with confidence bid our brethren at the bar take courage and look out upon the new year hopefully and undismayed.

Law Students and the Bible

PRESIDENT HENRY S. BARKER of the State University of Kentucky, in a recent address to the students of the College of Law of the university, advised the students to study the Bible, expressing the opinion that a thorough knowledge of the Bible would be of infinite advantage to every student of the law. "The Bible is the foundation of modern law," he said, "and for this reason a working knowledge of it will be of much benefit to the young lawyer." This was good advice. It is, in a sense, unfortunate that the Bible should have become fixed in the popular mind with a wholly theological significance. For thus its legitimate claims as literature have been quite ignored. To the general reader the Bible has been more or less a sealed book, and its priceless historical, philosophical, ethical and poetic treasures have been open mainly to the often purblind sectary and religious enthusiast. In some quarters it may seem irreverent to suggest a secularization of the Bible. Yet something of the sort seems necessary in order more widely to diffuse its educative and cultural value. The argument that doubtless availed more than any other to exclude the Bible from the public schools was that it was being used in furtherance of sectarian propagandism. But it can hardly be gainsaid that there is a distinct loss to the youth of the present day in their being denied the early knowledge of the Bible which was brought home to those of former days when the good old custom prevailed of opening school with the reading of a chapter from the Scriptures. No doubt the persistence with which in times past the Bible was forced upon the attention of the young, both in and out of school, was rooted in a narrowly religious purpose. But there were unquestionably certain valuable educative by-products in the process. One can hardly fail to see some connection between the character of Lincoln's writings and the fact that in his boyhood the Bible was one of the two or three books that were given to him to appease his voracious appetite for reading. His speeches and addresses abound with Scriptural allusions, and to the same source may be attributed that dignity and elevation of style which gave to much of his writing such matchless force and felicity. In the light of this conspicuous example law students may well be advised to read the Bible. They may not thereby acquire the style of a Lincoln—for in the last analysis "the style is the man"—but they will add richly to their intellectual equipment, and by so much make better lawyers.

Case Dependence in Judicial Opinions

JUSTICE CARR, in *Watkins* v. *Crouch*, 5 Leigh 567, concludes his opinion in the following language: "It will we observed that I have cited no cases in support of this opinion; not that I have not read, and considered, and puzzled myself with, the multitude that were commented on in the argument; but because, finding them like the Swiss troops, fighting on both sides, I have laid them aside, and gone upon what seems to me the true spirit of the law." We venture to say that the opinions in the reports would be as convincing—certainly more readable—if the judges generally were more inclined to follow Justice Carr's example. We have heard much about the case lawyer. Shall we be guilty of lese-majesty if we say there are also case judges? Many of our court opinions fairly bristle with citations. Every proposition enunciated is buttressed with them, making the opinion more resemble an annotation than a juridical exposition. Judges must of course have and study the cases in order that they may, peradventure, determine what the law is upon a given subject. But why interlard their opinions with them? Are the cases any more than the scaffolding for the erection of the judicial edifice, which should not be permitted either to encumber or to deface the completed structure? The great judges of the past did not crowd their opinions with profuse citations. In the alembic of their minds most of the cases were distilled into the text. The few that appeared in the opinion were integral parts of it. They "belonged," and served to knit the opinion together into a homogeneous whole. In the latter days, of course, cases do more abound. But this does not necessitate their cumulative use, nor, as in many opinions, their employment, as judicial stilts to stalk from one isolated proposition to another. Moreover, the law is, or should be, a progressive science. It can be made so only under the guidance of the reason and spirit of the law, and not by a slavish dependence upon precedent. The doctrine of *stare decisis* is no doubt a salutary one, but it can be pushed too far. No principle of law should be permitted to become so case-hardened that it will not bend to the needs and demands of new times and new conditions. There was something admirable in the virile independence displayed by Chief Justice Anderson in an early English case (Gouldsborough, p. 96) where counsel suggested that there was not a single case to support an adverse ruling. "What of that?" the chief justice responded. "Shall not we give judgment because it is not adjudged in the books before? We will give judgment according to reason; and if there be no reason in the books I will not regard them."

Christian Science and the Law.

THE question whether or not a Christian Scientist who denies that there is any such thing as pain can recover damages for pain caused by an accident was raised but was left undecided in a suit recently brought in New York City by a Christian Scientist against the Interborough Company for $30,000 damages for "pain" suffered by her by reason of a fall she received while entering a subway station. On the witness stand the plaintiff did not refer to her fall in the subway as having given her any pain. She merely admitted that she had encountered an "error," and that after having stopped long enough to learn the "truth" she continued on her way to church. Her husband, however, who either was not a Christian Scientist or was alive to the worldly necessity of speaking in a language that court and jury could understand, testified that his wife had endured much pain on account of this error, so much, in fact, that she had to leave church in the middle of the service and go home, where a physician attended her and did what he could to assuage the internal pains which he, as a regular medical practitioner, felt certain she must have endured. The court sidestepped the nice question of damages for a "painless" injury and dismissed the case on the ground that the evidence showed no actionable negligence on the part of the defendant. It may be surmised that in this action of the court the plaintiff will think she has encountered another "error" and take the case to a higher court.

Supreme Court Decision on the Oklahoma Jim Crow Law.

IN the December issue of LAW NOTES attention was called to the argument in the United States Supreme Court on the constitutionality of the Oklahoma separate coach law, which law, in addition to the usual requirement in such legislation of separate cars and waiting rooms for the white and negro races, permits the railroads to use the chair cars, sleeping cars and dining cars exclusively for white persons. The Circuit Court of Appeals, by a divided court, held the law constitutional, and refused to enjoin its operation. See *McCabe* v. *Atchison, etc., R. Co.*, 186 Fed. 966, 109 C. C. A. 110. The judgment of the Circuit Court of Appeals has now been affirmed by the United States Supreme Court, but the decision is in the nature of a Scotch verdict. A majority of the court express the opinion that the law is unconstitutional so far as it allows the railroad to discriminate against negroes by providing sleeping, dining, or chair cars for white passengers but not for black. By reason, however, of record errors in the previous proceedings on the part of the appellants the justices holding as aforesaid join the other justices in affirming the decision of the lower court. The Supreme Court decision, it would seem, can afford little comfort to the adherents of the separate coach idea. The railroads in Oklahoma will hardly feel secure in denying sleeping, dining, or chair car privileges to negroes in view of the majority opinion of the Supreme Court upon the discriminatory feature of the Oklahoma statute.

Reform at Sing Sing

PRISON reform in the State of New York has received a considerable impetus by the appointment of Thomas Mott Osborne to the post of Warden of Sing Sing Prison. Mr. Osborne is a member of the New York State Commission on Prison Reform, and some months ago, as will be remembered, spent a week in Auburn prison in voluntary servitude for the purpose of getting first-hand knowledge of prison conditions. As warden of Sing Sing he will now have an opportunity to put into effect whatever plans for prison improvement he may have cogitated during his self-imposed incarceration. Some reforms that he will institute are already foreshadowed in a published interview had with him at the

close of his first day as warden. Here are a few of the things he said:

"The cells in the six-tier block must go. They are not fit habitations for pigs. They are damp and productive of disease, especially of tuberculosis."

"The coffee is the vilest stuff I ever tasted. I tried to drink some, but had to take cocoa."

"There is not work enough to go around. I think the best way will be to put the men on two-hour shifts, and allow them opportunity for athletic exercise in addition."

"I am going to allow the prisoners to talk. I think the policy of silence is diabolical. It is as bad as the dark cell treatment, which has been abolished at the demand of an outraged civilization."

"Before I leave the prison I hope to see capital punishment abolished."

From these observations it is plain to be seen that Mr. Osborne intends to mark out new lines for himself in the conduct of the famous, or shall we say infamous, bastile on the Hudson. In so doing he will undoubtedly encounter considerable opposition, especially from that portion of the community which is still obsessed by the mediæval idea that compensatory punishment and not reformation is the main purpose of prisons and penitentiaries. It is to be hoped, nevertheless, that Mr. Osborne will be given a free hand at Sing Sing in carrying out his reformatory measures. He may err on the side of a too lax humanitarianism, but the State may well take the chance of this in view of the lamentable failure of the repressive and punitive prison policies of past years.

Minimum Wage Laws.

JUDGE CATLIN of the district court at St. Paul, Minn., in a decision recently handed down, holds unconstitutional the minimum wage law passed by the 1913 legislature of Minnesota, and has ordered a temporary injunction against the state auditor and members of the Minimum Wage Commission restraining the further expenditure of money in carrying out the provisions of the law. The decision appears principally to be rested on the ground that the law delegates legislative powers to an appointive commission. Judge Catlin says further, however, that "the actual working of the law would be apt to increase immorality if morals are dependent upon wages," and that "the State cannot lawfully become a paterfamilias until the form of government has been entirely changed." Judge Catlin's decision has elicited considerable adverse comment from the newspaper press. The New York Tribune, for example, in an editorial under the title "A Muddled Minimum Wage Decision," says: "The learned judge who held Minnesota's minimum wage law to be unconstitutional seems to have had a mixture of motives—or reasons—but to have been utterly determined that the law was a bad thing. In the first place, 'the actual working of the law would be likely to increase immorality if morals are dependent on wages.' Just what business that is of any judge no constitution undertakes to say, but it appears to have been an argument against the validity of this particular law. In the second place, the law, instead of fixing blindly a minimum rate of wages, delegated power to a commission to investigate and determine rates. Minnesota may have a constitution so worded that this is contrary to its provisions, but it is good recognized legal procedure in many other states. Also the 'abridgment of the right of the individual to contract,' held to be another unconstitutional feature of the measure, has not been so held in Oregon. Save for the fact that it applied to males under twenty-one as well as to women and children, Minnesota's was one of the mildest of the minimum wage laws passed in 1913. It was a tentative, experimental sort of statute. The legislature which enacted the law was commonly held to have been moderate to a degree, though wise in recognizing the need of such protection for workers. Judge Catlin's decision indicates that something is seriously wrong with the state's constitution—or its courts. Just what, and which, the Supreme Court may show on the appeal from this decision."

Minimum wage laws affecting private employments have been enacted in a number of the states, but in only one does such a law appear to have been subjected to a constitutional test in the highest court. The Oregon law fixing minimum wages and maximum hours of labor for women and minor workers was upheld in the recent case of *Stittler* v. *O'Hara,* 139 Pac. 743, as a legitimate exercise of the police power of the state. See also the still later case of *Simpson* v. *O'Hara,* 141 Pac. 158, wherein it was specifically held that the Oregon law was not obnoxious to the privileges and immunities clause of the fourteenth amendment to the Constitution of the United States. Over against these Oregon cases, however, must be set the case of *Street* v. *Varney Electrical Co.,* 160 Ind. 338, wherein a minimum wage law was declared unconstitutional. It is true that in the latter case the law that was condemned related to unskilled labor employed upon public work, but the arguments upon which the court rested its ruling might have been used with equal pertinency to impeach the validity of a minimum wage law affecting private employments.

There are certain natural and economic laws that are opposed to the principle of the minimum wage. But the validity of minimum wage laws will not hinge upon the question whether they square with the accepted doctrines of political economy. They will be upheld unless they violate some provision of state or federal constitution. Upon the constitutional question the Supreme Court of the United States must, of course, speak the last word, and it is altogether likely that it will soon have an opportunity to do so.

Bryce's Comments on General von Bernhardi.

PROBABLY no book has attracted so much attention during the past few months as General von Bernhardi's "Germany and the Next War." Published in 1911, it seems to have been prophetic of the German attitude and ambitions in the present war. The book is a glorification of war and an admirable brief for the advocates of militarism. Pacificists will be glad that a doughty champion has entered the lists to combat the unsound and unwholesome doctrines of the book. This champion is no less a personage than James Bryce (now Viscount Bryce), the distinguished author of "The American Commonwealth" and lately the English ambassador to this country. Viscount Bryce's admirable review of von Bernhardi's book as published in the London *Daily Chronicle* and the New York *Times* first gives a list of typical quotations from the author illustrating his main contentions. Some of them are:

"War is in itself a good thing. It is a biological necessity of the first importance."

"War is the greatest factor in the furtherance of culture and power. Efforts to secure peace are extraordinarily detrimental as soon as they influence politics."

"Efforts for peace would, if they attained their goal, lead to general degeneration, as happens everywhere in nature where the struggle for existence is eliminated."

"The end-all and be-all of a state is power, and he who is not man enough to look this truth in the face should not meddle with politics."

"The state is justified in making conquests whenever its own advantage seems to require additional territory."

"In fact the state is a law unto itself. Weak nations have not the same right to live as powerful and vigorous nations."

As Viscount Bryce says, such doctrines could scarcely be subscribed to by educated men of any civilized nation. The majority of von Bernhardi's own countrymen would reject them. A state is surely bound by the laws of morality, responsibility and common humanity, just as individuals also are bound, and cannot simply follow the dictates of a "superheated national self-consciousness."

The most valuable part of Viscount Bryce's discussion is his criticism of the dictum "The end-all and be-all of the state is power." He says: "It is only vulgar minds that mistake bigness for greatness; for greatness is of the soul, not the body. In the judgment which history will hereafter pass on the forty centuries of recorded progress toward civilization that now lie behind us, what are the tests it will apply to determine the true greatness of a people? Not population, not territory, not wealth, not military power; rather will history ask, what examples of lofty character and unselfish devotion to honor and duty has a people given? What has it done to increase the volume of knowledge? What thoughts and what ideals of permanent value and unexhausted fertility has it bequeathed to mankind? What works has it produced in poetry, music and other arts to be an unfailing source of enjoyment to posterity? The small peoples need not fear the application of such tests. The world advances, not as the Bernhardi school supposes, only or even mainly by fighting; it advances mainly by thinking and by the process of reciprocal teaching and learning; by the continuous and unconscious co-operation of all its strongest and finest minds. Each race—Hellenic, Italic, Celtic, Teutonic, Iberian, Slavonic—has something to give, each something to learn; and when their blood is blended the mixed stock may combine gifts of both. Most progressive races have been those who combined willingness to learn with strength which enabled them to receive without loss to their own quality, retaining their primal vigor, but entering into the labors of others, as the Teutons who settled within the dominions of Rome profited by the lessons of the old civilization."

These are words of truth and soberness, and may well be pondered by the Jingoes who are loudly clamoring for increased armaments and for a policy of war preparedness that would, it seems to us, lessen moral influence in the present world crisis.

Soldiers' Wills.

AMONG the legal questions that will arise out of the European war the question that will doubtless be raised with the greatest frequency will be that as to the requirements necessary to the validity of soldiers' wills. This question is discussed interestingly by Mr. Donald Mackay of Glasgow, Scotland, in a recent issue of the *Central Law Journal*. Noting the rule of law which puts the wills of soldiers in a privileged position, Mr. Mackay says: "The privileges attached to a soldier's will originated, it is said, in the legions of Julius Cæsar. One cannot be certain as to that, but that they sprung out of the Roman law is generally accepted by legal historians. The Romans required the observance of numerous solemnities in the making of wills, far more than English law requires, but all this red tape was dispensed with as regards the wills of soldiers *in expeditione*, that is when they were on active service, as Cæsar's legions were in Gaul or the British expeditionary force is in Belgium. The Roman soldier's will was held valid though made when he was under age; though not written, if sufficiently proved by witnesses; and though devoid of all formalities. In British law these same rules have obtained and in the course of time have been amplified."

After giving a number of illustrations where verbal declarations, letters, and unsigned memoranda in note books, writings on fly-leaves of Bibles, pencil jottings, and so on, had been given effect to as wills by the British courts, Mr. Mackay continues: "Now it is plain that however justifiable it may be to allow all this looseness in the case of soldiers, it opens a wide door to abuse, irregularity and even deliberate fraud, and therefore the Roman authorities wisely limited the privileges to soldiers on actual military service. Some authorities say that the words *in expeditione* imply an even stricter limitation and that the soldier must have been on a definite expedition. Our courts, while adhering to the general rule of the Roman law, have differed as to what the condition referred to exactly meant. In some cases it has been held that a soldier sent abroad to a foreign station in time of peace is on actual military service, and one judge held the doctrine applicable to any soldier in the regular army, as opposed to volunteer forces. On the other hand, the privilege was refused in the case of an officer who had left England to take over a command in the Indian army, and died in Mysore, and that even though he was actively discharging the duties of his command, and was at any moment liable to be called upon to march with his division to whatever point the exigencies of a native war, then being carried on in India, might require. Yet apparently as he had not gone on any actual military expedition the court refused to recognize him as a soldier on actual military service. That case has not been overturned, but it may be taken for granted that it is too strict and savors too much of the pedantic to be now acceptable."

In view of these conflicting cases, says Mr. Mackay, Sir Francis Jeune, when the Boer cases came before him, attempted to formulate a rule that would be generally acceptable. In his opinion two things were essential in order to bestow on oral bequests or informal writings the privileges of a soldier's will. First, a state of war must exist, and second, some active step should be taken by the testator towards joining the forces in the field. Applying the foregoing rule to present circumstances, Mr. Mackay concludes that the privileges referred to will undoubtedly extend to all men in the expeditionary force in the present war, or who may be drafted away in connection with

it. But is it confined to them? Mr. Mackay asks: "Are the rest of the regular army and the territorial and other troops excluded? Very difficult questions may arise on this point. It is said in some quarters that every one who is doing military work at the present moment is in actual military service, but if, as has been already done, the court applies the Roman restriction of *in expeditione* that view is too sweeping." Mr. Mackay's own opinion is that the reason for the Roman rule was that the soldier was in a foreign country where facilities for will-making were not available, and the danger and circumstances in which he was placed did not favor elaborate consideration and deliberation, but that when the soldier returned to his own country the necessity for giving him any special privileges ceased. Similarly in the present case, any man who is not out of the United Kingdom has plenty of time, opportunity and facilities to put right his affairs in proper form, and therefore should be required when making his will to conform to the strict rules of testamentary disposition.

Mr. Mackay does not mention the English statute on the subject (1 Vict. c. 26), by which it was enacted "that no will shall be valid unless it shall be in writing," but which contained the proviso "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act." Many of the states of the Union have enacted similar provisions. These statutes, of course, still leave open the question: "What is actual military service?" The courts in this country, while inclined to give the phrase "actual military service" a liberal interpretation, have in the main followed the English courts in holding the phrase to have substantially the same connotation as the *in expeditione* of the civil law.

DO WE DESIRE TO VOTE ON JUDICIAL DECISIONS?

By GUY L. FAKE, Judge of the District Court, Bergen County, New Jersey.

AMONG the many issues which have been given prominence in recent political campaigns, probably none is of more importance and certainly none is of more intense interest to the student of civics than the proposed extension of the franchise to a popular vote on certain classes of judicial decisions. It is a regrettable fact that such subjects are not of more common interest. The average voter gives but little thought to them, and but few seem to have a real understanding of their meaning and purport. It would seem that a very favorable time for the study of such questions is during the interim between seasons of active political campaigning, at a time when our minds are more open to reasonable argument and less liable to be biased or inflamed by extraneous issues.

To enter upon the subject intelligently we must first ascertain definitely what is suggested in the way of voting on judicial decisions. There are those who have been of the opinion that if the proposed scheme were carried out, any litigant aggrieved or disappointed by a court decision might, by petition or otherwise, secure a referendum of the decision to a popular vote and thereby obtain an opportunity to overrule the court. This no doubt would appeal very strongly to an angry suitor against whom the court had ruled, but this idea of disposing of the general run of legal cases has not as yet been proposed. The proposition to vote on decisions is confined and limited to cases wherein constitutional questions arise on legislation declared by our highest courts to be unconstitutional because not within the police power of the state. The idea may be fairly well stated as follows:

> When an act, passed under *what the legislature believed to be* the police power of the state, is held unconstitutional under the state constitution by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote on the question whether they desire the act to become a law, notwithstanding such decision.

This statement of the proposition is partly from the platform of the Progressive Party, the words, "what the legislature believes to be" being added, for without them the statement would be meaningless. The Progressive platform reads as follows: "When an act passed under the police power of the state is held unconstitutional . . ." To refer to an act passed under the police power of the state as being unconstitutional is equivalent to saying a constitutional act is unconstitutional, which of course is contradictory on its face. When it is explained that the court alone can decide definitely whether an act is within the police power or not, and that its constitutionality depends entirely upon this point, it will be seen that when the court decides that it is within such power, the act is bound to be constitutional and the court would so hold. Therefore an act passed under the police power of the state never has been and never could be held unconstitutional by the courts. If it is within the police power it is necessarily constitutional. I point this out merely to show that the subject is not as simple as would seem, for even the advocates of the idea have fallen into error in stating their own proposition. If we would fully understand this subject we must have some conception of what the "police power of the state" really is. It is quite impossible to frame a complete definition of this term, for if such were attempted it would most certainly include certain elements entirely foreign to its scope. A legal writer says on the general nature of the subject:

> "The police power is an attribute of sovereignty and exists without any reservation in the constitution, being founded upon the duty of the state to protect its citizens, and provide for the safety and good order of society. It corresponds to the right of self preservation in the individual, and is an essential element in all orderly government, because necessary to the proper maintenance of the government and the general welfare of the community. Upon it depend the security of social order, the life and health of the citizen, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property, and it has been said to be the very foundation upon which our social system rests." A. & E. Ency. of Law.

In explaining it certain legal maxims are often used: "Sic utere tuo ut alienum non lædas," meaning, "So use your own as not to injure another's property." And, "Salus populi suprema lex," meaning, "The safety of the people is the supreme law." The police power is inherent in the state, and exists even though the constitution makes no reference to it, for it has been held that the constitution presupposes the existence of this power. Our constitutions expressly provide that persons shall not be deprived

of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation, and it is largely out of the judicial construction of these provisions that the so-called "police power" as we know of it in this country has been given prominence; and when we speak of property we mean intangible as well as tangible things. Of course there is nothing in the foregoing constitutional guaranties which would preclude the taking of private property for public use where compensation is provided. This form of taking private property is technically known as the right of eminent domain, and is distinguished from a taking under the police power in this: that under the right of eminent domain, private property is taken for public use and the owner is *compensated* for his loss, while under the police power if one is deprived of his property it is *not taken for public use* but demolished, destroyed or injured for the general welfare of the public. Again, the exercise of the police power may result only in the limitation or regulation of the use and enjoyment of property by its owner. In neither of these latter instances is any compensation necessarily awarded. The police power is never exercised thus limiting and restraining the individual in the use of his property or destroying it outright, except in instances where necessity requires it to be done for the protection or conservation of the public good. Under this great power, individuals may be constrained in their conduct in respect to matters which would be otherwise right, and likewise in the use of their property; for illustration, the legislature by virtue of this power may regulate and control the use and operation of railways, prescribe the age and hours of employment in factories, department stores, and the like, quarantine buildings to prevent the spread of contagious diseases, regulate the use of public halls and theatres, provide building restrictions and restrictions for the prevention of fire, provide for the licensing of hawkers, peddlers, and other public speakers, and, without legislative enactments on the subject, buildings and personal property may be blown up or destroyed to prevent the spread of fire without remuneration to those whose property may have been thus taken. And so also tubercular cattle and unwholesome food may be taken from their owners and destroyed without remuneration, the necessity of these cases being the loser's misfortune, and *damnum absque injuria.*

It will appear that in each of these instances, public welfare is in the balance on the one side while the liberty or the property of the individual is weighing against it on the other.

It may be well to explain at this point, that while a large latitude of discretion is necessarily vested in the legislature so that it may decide what the interests of the public require and what measures may be necessary for the protection of such interests, yet the character and quality of such police regulations and the questions as to whether or not they are reasonable, impartial and consistent with the constitution and the policy of the state, has always been a question for the courts, the courts being the one place provided by our political system where a lone injured citizen may contest against the invasion of his individual rights against any multitude or power opposing him, and there have an opportunity to succeed if he is right in his contentions. It has been said that the police power is too vague, indeterminate, and dangerous to be left without some conservative control, and for this reason the courts, for lack of a better authority, have been called upon to perform that function.

Let us digress here for a moment and examine into this tremendous power of the courts to nullify legislation. Let us ascertain what some of the world's greatest scholars and statesmen have said concerning it.

After a critical examination of our institutions, including a careful analysis of the constitutional limitations of our courts, the learned De Tocqueville says on the subject:

"Within these limitations, the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers which have ever been devised against the tyranny of political assemblies."

But, we argue, conditions have changed since the forties when that great Frenchman visited us. His views, therefore, are old-fashioned, and if they are to be given weight, we must bring them down to date.

During the Lincoln-Douglas debates, this power of the courts was dwelt upon by both parties. Disappointed as he was with the decision in the Dred Scott case, Lincoln said of the United States Supreme Court:

"We think its decisions on constitutional questions, when fully settled, should control not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments to the Constitution as provided in that instrument itself. More than this would be revolution."

Douglas had this to say:

"The courts are the tribunals prescribed by the Constitution and created by the authority of the people to determine, expound and enforce the law. Hence, whoever resists the final decision of the highest judicial tribunal aims a deadly blow at our whole republican system of government—a blow which, if successful, would place all our rights and liberties at the mercy of passion, anarchy and violence."

These words spoken as they were in the late fifties may be likewise old-fashioned. We will therefore skip over the intervening years down to 1907.

The great British ambassador, Hon. James Bryce, in his exhaustive work, "The American Commonwealth," refers to this power of the courts in the following words:

"It is nevertheless true that there is no part of the American system which reflects more credit on its authors or has worked better in practice. It has had the advantage of relegating questions not only intricate and delicate, but particularly liable to excite political passions, to the cool, dry atmosphere of judicial determination."

And then further on he says:

"By leaving constitutional questions to be settled by the courts of law another advantage was incidentally secured. The court does not go to meet the question; it waits for the question to come to it. When the court acts it acts at the instance of a party. Sometimes the plaintiff or the defendant may be the national government, or a state government, but far more frequently both are private persons, seeking to *enforce or defend their private rights.*"

And again, to quote the same author:

"The Supreme Court is the living voice of the Constitution—that is, of the will of the people expressed in the fundamental law they have enacted. It is, therefore, as

some one has said, the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law. It is a guarantee to the minority, who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction."

This brings us nearly down to date, but let us bring it down to the man of the hour, the President of the United States. Mr. Wilson in his excellent book entitled "Constitutional Government in the United States," has the following to say:

"Our courts are the balance wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some non-political forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it judged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty."

The entire agitation favoring a popular vote on judicial decisions has undoubtedly arisen because of the action of the courts in holding certain legislative acts to be unreasonable in their interference with private rights, and therefore not within the police power of the state. The courts have exercised this prerogative in a great many instances. If the legislature goes beyond the scope of the police power in passing a law, it is the bounden duty of the court under our system of government and under our mode of judicial procedure, to declare the act invalid and thereby nullify its effect. To hold that every act of the legislature passed under the guise of an exercise of the police power is beyond judicial control, would render practically every personal right under the Constitution of little or no value, and nothing short of constant and eternal vigilance on the part of each individual in the state would prevent the legislature from going to great excesses in this direction whenever a temporary agitation might be launched; and if this be so as to a deliberative legislative body, how much more so would it be if the question were submitted to a popular vote. Let us suppose for illustration that you own a plant and employ labor. An act is put upon the statute books which dictates to you in what manner your business shall be conducted and regulated. You think it is an unreasonable law. You find it injures you greatly but benefits the man who sells you your supplies. You attack the law in court. The court sustains your contention and declares the act unreasonable, or, the court overrules you and holds the statute reasonable and within the police power. In either event, the losing side secures a referendum to the people. What will the campaign issue be based on? Your principles of dry legal contention against those of your adversary, or will it be your personality and that of your friends against his personality and that of his friends? How many voters would remain in their seats while your lawyer and his lawyer attempted to teach and discuss constitutional law and history? How many people would attend your campaign meetings? What proportion of the legal voters would take the trouble to vote at the special election? Of the vote polled what proportion would be intelligently cast on the principles involved, and what proportion would be based on your personal reputation and popularity against that of your adversary? These questions in a small degree disclose the great dangers lurking in such a procedure. Such campaigns would surely result in battles royal between small bodies of voters. Right and justice in many instances would be in the balance on the one side, and might, numbers and organized voting strength on the other. Ignorance organized would most surely defeat wisdom unorganized. The employer of labor whose business activities are unduly and unreasonably curtailed, regulated or restrained, would make but a poor showing in a campaign against the organized labor in his employ. The reasonableness or unreasonableness of the restraints placed upon the employer would have but little weight in such campaigns, and the employees would not be long in ascertaining that through this system of voting on judicial decisions they might eventually dictate the entire business policy of their employer, they being themselves the judges of the constitutionality or unconstitutionality of any law they might secure the passage of. If the vote in such campaign should result in the overruling of the court, it would have the same effect as a constitutional amendment. The masses in pursuit of their daily occupation would actively participate in these campaigns only when their own immediate interests might be affected. They would give but little heed to the indirect or remote effects, but sooner or later would awaken to find themselves bound, with no opportunity for a further campaign until another case might be tried by the court on the same subject.

Among the numerous decisions wherein the courts have dealt with the subject of the police power of the state, none will be found wherein the courts have been led to a decision by any private interests of their own in the subject matter before them, nor will any case be found where the question of the popularity or unpopularity of a legislative act has had a controlling influence on their decisions. The question as to whether or not the people desire the act to be upheld never enters into their deliberations. The character of the persons advocating the bill and the character of those opposing, likewise have no bearing on the subject so far as the court is concerned. These questions are for the legislature. The court is not the forum wherein these questions are properly given consideration. In passing upon the question as to whether or not a legislative act is within the police power of the state, the courts confine themselves to the question as to whether or not the act is reasonable and impartial in its operation. Can it be imagined that the people enfranchised to vote on the subject would forget all self interests

and kindred motives in casting their ballot? The popularity of the act, the desire for its passage, and the character of its proponents would most certainly have a swaying influence upon the mind of the average voter. Individuals and minorities would soon find their inalienable rights, as set forth in our constitutions of to-day, of little avail, for they would be swept aside by the votes of the majority in one instance after another until none would remain; and it was for our protection against this very defect in human nature that our forefathers so wisely provided, in the creation of our courts and their entire separation from the other two branches of government.

The problem, therefore, which we as voters have to solve is this:

Shall we allow the courts to pass upon the reasonableness or unreasonableness of legislative enactments which the legislature may have passed under the guise of the police power, or, shall we take this herculean task unto ourselves? In short, shall we say that we, with our limited knowledge and lack of training in constitutional matters, are greater in wisdom than the learned jurists of our highest courts? Can we voters with safety to ourselves and the generations to follow, decide with honest intelligent conviction that there is much to be cherished in a government wherein our private constitutional rights may be thus easily jeopardized or destroyed? To hold that there is, would be equivalent to placing a premium upon ignorance and an indictment against our entire educational system. To proclaim that the jurist who has undergone years of careful thought and study on the subject of the police power of the state is no more capable of passing on it intelligently than one who hears of it for the first time in a political campaign, is nothing short of absolute nonsense. It is quite equivalent to declaring that the knowledge of the learned expert is of no more value than that of the ignorant inexpert. We may have outlived many of the lesser ideals of our forefathers, but certainly we have not so far outlived the past as to maintain to-day that knowledge should be placed in chains and made the servant and slave of ignorance. So let us disregard all superfluous argument—all argument tending to excite the baser passions. Let wisdom prevail; permit the learned and skilful surgeon to prevail in matters touching upon his profession; permit the clergy to prevail in matters touching upon their profession; permit the successful engineer, the chemist, and the merchant to prevail in their spheres, and by all means permit the learned jurist to prevail in deciding for us those questions concerning which he is especially trained.

Should the time ever arrive in state or nation when the administration of justice through the medium of the courts becomes a mockery, or a menace to our ideals; should the time ever arrive when the courts render decisions in absolute discord with our ideas of sound social justice—let us approach the solution of the problem then presented in a logical and enlightened manner. We are not left without a remedy. By amending or redrafting the Constitution we may obtain the laws we desire. To this the restless agitator replies, "It takes too long—it takes too long." But let us soberly reflect upon this point. Is not this very delay the test of the reality of our desires and likewise of their merits? If we would tire of them or forget them in a period of five years can we say they are real in their essence?

The Constitution is the foundation upon which our entire governmental structure rests. Voting on judicial decisions is, in its final analysis, merely the means of bringing about a quick amendment to it by a confusion and confounding of the judicial and legislative branches of government—quite as reasonable as using an axe in performing the operation for appendicitis. I have referred to the Constitution as the foundation. If one would erect a building in a workmanlike manner he would first erect the foundation and thereafter the superstructure. Voting on judicial decisions is analogous to erecting an addition to a building with no foundation for the addition to rest upon. Amending the Constitution as provided in the instrument itself, is the only workmanlike way of building our basic law. The foundation or constitution first, and the superstructure or legislative act afterward, for by so doing the principle involved in the proposed amendment is laid bare, disconnected from all irrelevant attributes, and its general operation may be clearly seen and understood by all.

As long as humanity remains imperfect—so long as the courts remain a necessary adjunct to prevent injustices, we shall have honest differences of opinion as to the correctness of the legal decisions of our forums of last resort. Yes, and also as to those decisions upon which a vote might be had. So let us remember that in our haste to bring about reforms we must hold fast that which is logical and good, that which always has been good and every one agreed was good until a few months ago. Our constitutional system and the great superstructure of legislation we have built upon it serves to-day as a great beacon light, casting its rays of hope to the down-trodden and oppressed peoples of the world, as is evidenced by the myriads of them who daily land among us. We cannot study the constitution of our beloved country, peruse the debates which led to its creation and adoption, or contemplate the condition of the thirteen colonies at the time of its acceptance, and the condition of this great land to-day, without concluding that the all-wise Creator of the universe exercised a guiding hand in its formation; and if to-day, because of the tremendous commercial strides we have taken, the old document is not big enough or broad enough, let us go to the task in a workmanlike way. Let us amend or re-draw it, but by all means do not permit a careless, makeshift remedy, such as campaigning and voting on the decisions of our courts, to mislead us into causing a commingling of the legislative and judicial branches of our government into an indefinable and shapeless mass of confusion.

COLLEGE GRADUATION AS AN ENTRANCE REQUIREMENT TO LAW SCHOOLS

IN a recent contribution to the literature of the law, a very learned lawyer, speaking of John Marshall, the greatest of American judges, declared that "his experiences at college had probably little effect upon his mental development." This remark, coming from one who was then dean of a well known law school, just previous to the announcement by the authorities of that school that in the future graduation from college would be a prerequisite to admission, might well be cited as justifying a doubt as to the purpose which those who insist upon a college educa-

tion desire to accomplish. But Marshall's college experiences were of short duration, and we cite the remarks of the learned lawyer solely for the purpose of introducing a discussion of the question whether a college education should be made a prerequisite for admission to a law school.

The history of the American bench and bar furnishes no justification for such a requirement. From the early colonial times, when Andrew Hamilton was "the most eminent practitioner in Pennsylvania and the adjoining colonies," until the present, when John G. Johnson is the acknowledged leader of the bar of Pennsylvania, a large percentage of the most eminent lawyers and judges have been men who were not college graduates.

It has been truly said that the career of George Wythe of Virginia was eminent along many lines, but that "in three respects at least—as statesman, as teacher, and as jurist—he had few equals in the galaxy of great men that adorn the annals of Virginia." Wythe was not a college graduate. Nevertheless he became famous for his knowledge of science, of philosophy, of the ancient and modern languages, and, in addition, had the honor of being elected the first university law professor in the United States and the second in the English speaking world—Sir William Blackstone being the first.

Overwhelming proof of Patrick Henry's standing in his profession as a great and profound lawyer is furnished by the fact that Washington asked him to become chief justice of the United States. Henry never attended college, and it is certain that he gave no sign at the time of his leaving school, nor for many years afterward, of the possession of those intellectual powers which were subsequently to make him a leader in his profession and a supreme power in the stirring events of the early history of our country. Indeed, at the time of his admission to the bar at the age of twenty-four, Henry was a man who had failed in every enterprise he had undertaken and had given no evidence to anyone of those extraordinary gifts which were to make him, in the words of Marshall, "a great orator, a learned lawyer, a most accurate thinker, and a profound reasoner."

Chief Justice Marshall, speaking of a certain American lawyer, said that he was the greatest man he had ever seen in a court of justice. Justice Story attributed to the same lawyer "a great superiority over every man whom he had known." Chief Justice Taney, speaking of the same lawyer, said, "I have heard almost all of the great advocates of the United States, both of the past and present generation, but I have seen none equal to him." The name of this lawyer was William Pinkney. Pinkney was not a college graduate.

The history of William Wirt of Virginia is one of gradual, steady and notable achievement. Without a college education, he became successively Chancellor of Virginia, United States District Attorney and Attorney General of the United States. At the time of his admission to the bar he had not given evidence of talents or industry from which a great career at the bar could reasonably be prophesied, and it is said that during his early years at the bar he was "held up as a horrible example from one end of the country to the other." Nothing, however, could be more consistent than the rise and progress of Wirt in his profession. From briefless barrister he became the acknowledged leader of the Virginia and the Baltimore bars, and his ability as a lawyer is specifically attested by the prominent part he played in the trials of Callender, Burr, and Jefferson, in *Gibbons* v. *Ogden,* and the Dartmouth College case, and by the fact that he was elected professor of law and President of the University of Virginia.

John Bannister Gibson attended Dickinson College but was not graduated, and the tradition is that he made little mark as a student. Few, however, will deny that Pennsylvania, prolific as she has been of great lawyers and judges, has produced few, if any, equal to Gibson. For thirty-seven years he was a member of the Supreme Court of Pennsylvania and it would be difficult to overstate the value of his influence in this great constructive period of the law in Pennsylvania. At the time of his death, his successor, Chief Justice Black, said, "In the various knowledge which forms the perfect scholar, he had no superior. Independent, upright and able, he had all the highest qualities of a great judge. In the difficult science of jurisprudence he mastered every department, discussed almost every question and touched no subject which he did not adorn."

Charles O'Conor, of New York, received almost no education, as the word is understood to-day. The whole time spent by him at school was incredibly short—certainly not more than six months altogether. Furthermore at the time of his admission to the bar the profession of law was aristocratic and "a line was drawn between those who had had a college education and those who had not." In spite of these facts and of the prejudice which existed against him as the son of an Irish immigrant, by earnestness and diligence he early became one of the leaders and later the acknowledged leader of the New York bar, and continued in that position for almost forty years. O'Conor's greatness as a lawyer is attested by those who are themselves regarded as great lawyers. His contemporaries, men who were opposed to him in litigation, who were acquainted with his skill as a draughtsman and pleader, and with his ability in argument, have testified to his greatness. William M. Evarts said that O'Conor was, in his judgment, "the most accomplished, in the learning of our profession, of our bar," and that "he was entitled to pre-eminence in this province of learning among his contemporaries in this country, and among the most learned lawyers of any country under our system of jurisprudence." James C. Carter said that "he was, all things considered, the profoundest and best equipped lawyer that has ever appeared at this (the New York) bar," and that "he would not suffer in a comparison with the great lawyers of any nation or any time."

The fame which Lincoln acquired as President is apt to cause us to forget that he won distinction as a lawyer. Justice David Davis of the Supreme Court of the United States once said, "In all the elements that constitute a great lawyer he had few equals." Lincoln said of himself that he had never attended school more than six months in his life, and certified in the Congressional Directory that his education had been defective. Those who insist that a college education is a necessary prerequisite to the study of law are prone to argue that the achievements of Lincoln would have been even greater had he received a college education. It is, however, more probable that any other education than that which Lincoln had, might have dwarfed his rugged strength and impaired those solid and resolute qualities, those practical and homely virtues, which were the source of his success.

Stephen Arnold Douglas was a lawyer of eminence and distinction before he became a prominent figure in our national and political history. Douglas was not a college graduate, yet when less than twenty-eight years old, and within less than seven years from the time when as a penniless adventurer from the East he had been admitted to the bar of Illinois, he became a leader of the bar of Illinois and a member of its court of last resort at an age when most men are just beginning to practice.

Mercer Beasley served as Chief Justice of New Jersey for

thirty-three years and is generally considered to have been New Jersey's greatest judge. Though his father had been Provost of the University of Pennsylvania, Beasley, who entered Princeton, left college before graduation. During his career upon the bench his fame extended beyond the borders of the State. His complete knowledge of the law was a marvel to all who came in contact with him, and his opinions were famous for their learning and strength in jurisdictions where he was personally unknown.

It is related that Jeremiah Sullivan Black hated school. He left it finally at the age of seventeen to begin the study of law. His own predilection had been for the study of medicine and he felt no drawing toward the law. Nevertheless by patient labor, by earnest effort and by the help of his own remarkable mentality he acquired such knowledge as enabled him later to serve with distinction as Judge of the Court of Common Pleas, Chief Justice of the Supreme Court of Pennsylvania, Attorney General of the United States, and Secretary of State. His career was one of distinguished service to his country. "As most men fight for wealth, for position, and for life, he fought for honor, for justice and for civil liberty. For him there was but one thought—the welfare of his country."

Few treaties upon legal topics have achieved a more immediate and lasting success than Benjamin on Sales. It became a classic on both sides of the Atlantic and deservedly takes high rank among great juridical productions. The writer of the book, Judah P. Benjamin, who became famous as a leader of the bar in both England and the United States, left college at the beginning of his sophomore year and there was a rumor to the effect that he had been expelled. The esteem in which he was held by his contemporaries at the bar is shown by the fact that upon his retirement in 1883 a great banquet attended by all the leading lawyers of England was held in his honor at which Sir Henry James, the Attorney General, in proposing the health of Benjamin, said, "Who is the man save this one of whom it can be said that he held conspicuous leadership at the bar of two countries?"

Thomas McIntire Cooley "made for himself a name and place in our jurisprudence that entitles him to be ranked with the most distinguished jurists of his time." "Probably no judge upon a State Supreme Court left a record, that, all things considered, is superior to his." Certainly as a lawyer, writer and teacher he had few equals. He never attended college, yet in the words of one of his colleagues upon the law faculty of the University of Michigan, "somehow he attained a better education than nine-tenths of the college graduates. He learned from reading and the great school of life where most of us get the discipline which is most useful." And as said by a late dean of the same school, "it may have been fortunate for him and the world that necessity made him his own instructor."

These instances sufficiently demonstrate that it is possible for one without a college education to achieve success and render distinguished public service. They are typical and not exceptional. The history of the American bar is replete with cases of similar import and equal persuasiveness. Indeed, in reading this history one experiences a feeling of thankfulness that worthy men have not been prevented by artificial requirements from rendering service to their country at times when their country sorely needed their aid.

From the experiences of the past we should gain wisdom to guide us in the future. Especially is this true when the lessons which the past seems to teach are confirmed and strengthened by the experiences of the present. A present service to the nation, equal to that of the past, is being rendered by men who are lawyers but who are not college graduates. That the nation needs this service will hardly be denied. To decree that the nation shall not have it would be a dereliction of public duty.

The requirement is not justified by the experiences of those who have attempted to enforce it. In mediæval France admission to the medical profession was sedulously restricted to men of university training and, as a consequence, the medical profession became notorious for its backwardness and inefficiency. In Germany, centuries ago, an effort was made to exclude from the law schools all who did not have an arts degree. It was found, however, that the length of residence at the university necessitated by this requirement "produced idleness, dissipation and waste of time," and that the really successful institutions were those who accepted graduates of the secondary schools as candidates for degrees in law "just as freely and rapidly as circumstances would permit."

Harvard was the pathfinder in requiring a college decree for admission to its law school, and it is now the common belief that the doors of its law school are closed to all but college graduates. This impression is erroneous. Men who are not college graduates may have, as special students, all the privileges of the school in the way of instruction. "The future Abraham Lincoln and Daniel Webster," said the late Dean Ames of Harvard, "ought not to be excluded from any law school for want of a college degree."

The requirement is not justified by the experiences of American law schools. During the last fourteen years the law school of the University of Pennsylvania has classified its students under these heads: college graduates; men who spent one or more years in college but were not graduated; high school graduates. The general averages of all the men is as follows:

College graduates, 77.7.

Men who attended college but were not graduated, 73.1.

High school graduates, 75.5.

The difference between the general averages of the college graduates and the high school graduates is too slight to be used as the basis of any inference except the conclusion that if four years at college, with the consequent expense and postponement of one's admission to the bar, increases one's efficiency only two per cent it is not worth while. By four years' experience at the bar after admission one's efficiency is increased much more than two per cent.

The experience of other institutions has been similar to that of Pennsylvania. "We cannot exclude non-graduates from our medical school," said the president of a leading western university, "because so many of our best students are non-graduates." At a meeting of the Association of American Law Schools, Chester E. Cole, Dean of the Iowa College of Law, declared in effect that he had taught the law as a professor in a law school for thirty-nine years and that he had a long retrospect of graduates, numbering thousands, and that those who had made their mark, and advanced the profession, and aided in the establishment of a jurisprudence both wise and beneficent, were not college graduates. President Hadley of Yale has declared that "the non-college men in our professional schools are as a class industrious, and not a few among them are exceptionally able."

The requirement is not justified by the experiences of the State boards of law examiners. W. R. Fisher, who has served with great distinction as a member of the State Board of Law Examiners of Pennsylvania, speaking of the preliminary examination in Pennsylvania, has said, "A great many college graduates have been turned down in that preliminary exam-

ination. I may say that graduates of many prominent universities have failed to pass that preliminary examination."

In the ten years preceding 1911, the percentage of rejections by the State Board of Law Examiners of New York increased from 30 to 57 per cent. At the beginning of this period there were 14 per cent fewer failures among college graduates than among non-college graduates, but in 1911 this difference had diminished to 2.3 per cent.

Judge Franklin M. Danaher, who was for fifteen years a member of the New York State Board of Law Examiners, and assisted during that time in the examination of twenty thousand applicants, said in a paper which he read before the Legal Education Section of the American Bar Association in 1909, "Our experience is that a high school education requirement is high enough and practically sufficient. . . . An examination of our records shows that there is little if any difference in the percentage of high school graduates and collegiates;" and in the same year the State Board said, "The proposition to exclude from the bar all the bright and ambitious young men whose environment will not permit them to get beyond high school or to go to college may be idealistic; but, if it is, it is also impracticable. A high school education is practically sufficient and sufficiently prohibitory."

The requirement is inherently vicious. The standard which it purports to create is entirely inappropriate. It is not that before beginning the study of law one's mind shall have reached a certain degree of development, nor that one shall have acquired a certain amount of knowledge, nor that one shall have studied certain subjects, nor that one shall have studied certain subjects for a certain time. It is that one shall have studied certain subjects for a certain time in a certain place, to wit, a college.

It eliminates the possibility that by the study of subjects other than those included in the curriculum of the average college, one may acquire the knowledge and mental development essential to the successful study of the law. The field of human inquiry, and study, and knowledge, is large and constantly extending. In the average college the attention of the students is directed to only a few of the subjects included therein. There is no evidence to prove that by the study of these few subjects one's mind is especially attuned for the perception and assimilation of legal principles and the solution of legal problems. That there are many other subjects, the study of which may furnish the "liberal education" regarded as a prerequisite to the study of law, cannot be denied. Indeed the fact that within the last few years a large number of colleges have revised their curricula and eliminated therefrom subjects, a knowledge of which has been for many centuries considered essential to a liberal education, and the further fact that the curricula of the various colleges differ greatly, seem to furnish cogent evidence of this proposition. It is not fair, therefore, to exclude from the law schools men who have not studied particular subjects but who have studied other subjects of greater difficulty with equal earnestness and, in many cases, greater profit.

There has been much vague talk of culture studies, and an effort has been made to create the impression that a college education is essential to culture. This is not true. Culture results whenever a serious student enters any field of inquiry. There is nothing quite so productive of culture as the study of law itself. "The study of law is of great value as an educational factor," said the Hon. W. Blake Odgers in addressing the Law School of the University of Wales. "It supplies all the fundamental requisites of a good education, for it tends to develop and enlarge the mind, and to quicken and invigorate its powers." From it one acquires a knowledge of ethics, of logic, of philosophy, of psychology, an appreciation of literature, and above all a knowledge of life. If greater culture is desired we can obtain it, and at the same time serve important utilitarian purposes, by increasing the time required to be spent in the study of law.

Assuming, however, that the training and knowledge gained from the study of subjects embraced in the curriculum of the average college is necessary, it by no means follows that these subjects must be studied at college. They may be studied elsewhere with equal advantage and, frequently, with greater profit. "I recognize the ability," said Nicholas Murray Butler, President of Columbia University, "of the best secondary schools to do not only as well as, but even better than, the colleges have been in the habit of doing, the work of many of the studies of the freshmen and sophomore years. I believe it to be indisputable that many secondary schools provide better equipment and better instruction in English history, physics and chemistry than do any but very few colleges. College teaching has at this point failed to keep pace with the tremendous educational advances of the last generation; while the secondary schools have availed themselves of the new tendencies and opportunities to the utmost."

At a meeting of the American Bar Association in 1905, Horace L. Wilgus said, "I have been connected with university work substantially all my life, and I desire to say that my observation leads me to believe that the universities do not contain all the knowledge that there is. . . . I sometimes think that there are men in the university faculties who are not really doing the work they might do, and that there are people outside who can learn things that are as valuable to them as sitting at the feet of some of the members of faculties." At the same meeting W. R. Fisher said, "I believe in the best education a man can possibly attain, but I believe in his seeking whatever source of information is at his command." Speaking of the preliminary examination in Pennsylvania which is designed to *test the candidate's fitness for the study of law*, Mr. Fisher said, "A great many college graduates have been turned down in that examination. I may say that graduates of many prominent universities have failed to pass that preliminary examination."

The beneficialness of a "college education" is not universally conceded. Dr. William Trickett, who is a graduate of a well-known college and who served with great distinction as its professor of psychology and later as its professor of the modern languages, has recently said, "There is often much mistraining of youths in colleges. Much time and thought are bestowed by collegians on other than things of the mind. Some colleges are seminaries for propagating pernicious social and economical notions. In many independence, originality, divagation from accepted notions, political, religious, philosophical, are frowned on as serious intellectual vices. We think that the proposition that a college course is a good thing is entirely too broad. *Some* courses in *some* colleges are good for *some* men. Anything stronger than this is erroneous and mischievous. At least as true would be the assertion that some courses in many colleges are for many students pernicious." William L. Curtis, Dean of the St. Louis Law School, has said that it is not an uncommon thing for a college course to make a man a poorer student than he was when he finished high school.

A somewhat similar question was presented to the Section of Legal Education of the American Bar Association in 1909, when a rule was proposed which provided that no candidate should be registered as a student of law until he had passed the entrance examination of a collegiate department of the State university or of such other colleges as might be approved by the state board of law examiners. On the suggestion of Simon

E. Baldwin of Yale University that there should be an equivalent examination not under college auspices, the rule was amended by adding the words "or any examination equivalent thereto, conducted by the authority of the State." And as said by the chairman of the section, "The proposition in its present form probably represents, as far as may be possible, the present consensus of opinion at the bar."

"The great concern after all," said Dean Richards of the University of Wisconsin School of Law," is not whether a student has an A. B. degree, but whether he has sufficient training to carry on the work required." This training may be acquired elsewhere, and frequently is not acquired at college. It follows, therefore, that by excluding other reasonable tests of a candidate's fitness we will, instead of excluding incompetent men, simply compel many men who are competent to devote their time to something which is for them unnecessary and which may not be to their ultimate benefit.

The requirement does not create a uniform standard. "College graduation" does not stand for definite attainments. The standards of colleges, even in the same jurisdiction, vary greatly, and the significance of college graduation is entirely dependent upon the standard of the college. Indeed, owing to the prevalence of the elective system, and the variety of courses which colleges now offer, diplomas of the same college may stand for very different attainments. If the purpose is to adopt a general standard, that purpose is defeated rather than subserved by the requirement. Harvard soon discovered this fact, and, as a consequence, it has been compelled in administering its entrance requirements, to classify colleges as follows: "colleges of high grade;" "colleges of approved standing;" "colleges." This is surely a unique classification and one of which a just application is hardly possible.

The requirement would exclude from the profession many very desirable men. "It is doubtless true," said President Hadley, "that the requirement of a college degree would keep out a large number of unfit men from the rank of advocates. But the indications are that this gain would be offset by the loss of new blood and of the appreciation of public needs which such exclusiveness carries with it." "Require from the student of law whatever degree of professional training you may deem necessary for the fullest public service; but do not burden him with the additional requirement that he shall spend in his secondary education that amount of time which, as many of us know to our cost, only the rich can easily afford."

"What our profession needs," said Dean Cole of the Iowa School of Law, "is moral stamina, integrity and manhood." "We need those as much as we need higher education, and I submit to you that the higher education and the extension of this preliminary education will shut out from us the sons of farmers and mechanics, occupying that position in society from which come the moral sentiments and principles which preserve our profession. I say, therefore, to extend the time and require a measure of culture beyond that which the people in that stratum of society can give, is to shut them out and deprive our profession of the advantages which would come from that ruggedness of character and that sturdy integrity which is certainly found there more than in any other stratum of society." The late Chief Justice Williams of the Supreme Court of Pennsylvania once said that he could not have become a lawyer if a college education had been required.

The possible extent of this exclusion is indicated by the fact that statistics show that fewer than twenty-five per cent of the students in the law schools in the United States have taken a full college course.

The requirement unduly postpones one's entrance upon a career of actual service to the world. A student who enters college at the age of eighteen and spends four years there, and then spends three years in a law school, does not enter the bar until he is twenty-five, and if he adds a year in a law office, as is commonly done, he is twenty-six before he enters upon an active career at the bar, and "unless his career is exceptional he will be at least thirty before his earnings will enable him to establish a home and assume the responsibilities regarded as essential to his well being and that of the state."

A leading medical journal has declared that this postponement of entrance to an active career is right, and that the young men who enter the professions must recognize the fact that they cannot, in many cases, afford to be both educated and married, but the feeling entertained by the general public and by the leading educators of the day is that it is bad for both the community and its young men to have its young men so long kept out of the active work of life; that the doors of the professions should not be closed to young men of worth of small means, who could not sustain themselves for so long a period, and that it is bad for a young man who can afford it, to lead for so long a period a life at variance with the life of the ordinary citizen. The feeling everywhere prevails that men who desire to enter the profession of law should be permitted to begin their life's work in time to reap some of its rewards before the flush and joy of youth are past, and that there should be some chance for a man, "although devoted to a learned profession to have a wife and home."

The requirement will increase the cost of administering the law, for lawyers will demand fees proportionate to the cost of their preparation. The great majority of questions which are addressed to a lawyer require for their solution neither great learning nor exceptional training. To require all lawyers to have exceptional training is to require clients to pay for exceptional training in a multitude of cases in which exceptional training is unnecessary. It would be as sensible to provide that no one might be a physician unless he were able to perform the most difficult surgical operations.

The requirement would tend to introduce a caste system of the worst sort. During the past generation the traditional distinction between the learned and the unlearned professions has been obliterated, and the fact that the work of the manufacturer and the financier, the farmer and the engineer, the journalist and the teacher, involves the same ability and character and carries with it the same social privileges and responsibilities that are involved in that of the minister, physician or lawyer, has forced itself upon the consciousness of the nation. "The gain from this source has been so great that it has been sufficient to counteract many of the other dangers by which the democracy of the nation has been menaced." It will indeed be a serious misfortune if the colleges and universities undo this work by singling out by artificial restrictions the profession of law as "the peculiar property of those who have inherited wealth and collegiate education." Such a course will arouse antagonisms to the profession of law rather than admiration for it, and, surely, further antagonisms to the profession ought not to be generated.

Influenced by the foregoing, and many other, considerations, the Dickinson School of Law has decided that it will not require college graduation as a condition for entrance. It is not willing to sacrifice its usefulness and influence in the community for the sake of gaining a prestige which would be both fictitious and elusive.

HARRISON HITCHLER.

Carlisle, Pa.

Cases of Interest.

RIGHT OF ONE INJURED IN AUTOMOBILE COLLISION TO RECOVER DAMAGES WHERE HE TURNED TO LEFT UNDER MISTAKEN BELIEF THAT DEFENDANT DID NOT INTEND TO TURN OUT.—A majority of the Supreme Court of Washington in Lloyd *v.* Calhoun, 143 Pac. 458, held that one driving an automobile, who, seeing another automobile approaching, violated the law of the road by turning to the left under the mistaken belief that the driver of the approaching automobile was not going to turn out, could not recover damages for an injury sustained by a collision which would not have happened if he had kept to the right. This holding was rendered on a rehearing of the case and there was a reversal of the judgment originally rendered which was in favor of the plaintiff.

CRIMINAL LIABILITY OF PHYSICIAN FOR NEGLIGENT OPERATION OF X-RAY MACHINE CAUSING DEATH OF PATIENT.—In State *v.* Lester, (Minn.) 149 N. W. 297, an indictment was held to show a cause of action which charged a physician with manslaughter in the second degree in that he was culpably negligent in the operation of an X-ray machine, the result being that the patient received a mortal burn, known as an X-ray burn, from the effects of which she died. The court said: "We must take judicial notice that X-ray machines sometimes inflict serious burns, and the indictment characterizes the instrument used as dangerous unless skillfully handled and presumptively known by defendant to be such, notwithstanding which he placed it too close to his subject, and also failed during an excessive exposure to give her the attention requisite to prevent injury. These allegations import criminal negligence, and the questions raised thereby are for the jury."

CLERK IN STORE OPENING SAME AT UNUSUAL HOUR AND UNLAWFULLY TAKING ARTICLES WHETHER GUILTY OF BURGLARY.—It seems from the recent case of State v. Corcoran, (Wash.) 143 Pac. 453, that a clerk in a store who enters the same with a key furnished him by his employer, and unlawfully takes goods therefrom, is guilty of burglary, and not larceny, if the clerk had no authority to enter the store at the time the entry was made, for the act of entering under such circumstances constitutes a "breaking." The court used language as follows: "If the appellant had the right to enter the store by the use of his key at any time in the day or night, that is, had an unrestricted and unlimited right of entrance, he could not be guilty of the crime of burglary, even though he carried away the goods from the store. In such event the crime would be larceny, and not burglary. But if his right to enter was limited to the usual hours of employment, and after hours of employment he used the key for the purpose of entering the store with intent to unlawfully take articles therefrom, he was clearly guilty of burglary."

CONSTITUTIONALITY OF STATUTE PROHIBITING CARRYING RED FLAG IN PARADE.—A Massachusetts statute was declared constitutional in Com. *v.* Karvonen, (Mass.) 106 N. E. 556, which provided as follows: "No red or black flag, and no banner, ensign or sign having upon it any inscription opposed to organized government or which is sacrilegious, or which may be derogatory to public morals, shall be carried in parade within this commonwealth." Chief Justice Rugg replying to the contention that the statute violated rights protected by the state and federal constitutions, said: "Under both these instruments the liberty of the citizen is guaranteed. But the liberty thus secured does not mean the unrestrained license of an unbridled will. Constitutional freedom means liberty regulated by law. Personal rights may be curbed in a rational way for the common good. Liberty is immunity from arbitrary commands and capricious prohibitions, but not the absence of reasonable rules for the protection of the community. . . . The statute here in question cannot be said to interfere unreasonably with the liberty of the citizens, nor can it be adjudged to have no rational connection with the preservation of public safety. The maintenance of order is plainly a lawful exercise of the police power. Statutes designed to promote that end cannot be stricken down as unconstitutional unless they manifestly have no tendency to produce that result. It is said in Webster's Dictionary that 'historically, a red flag has been a revolutionary and terroristic emblem.' In the Century Dictionary is found this: 'A red flag is a flag of a red color with or without devices associated with blood or danger.' Other lexicographers give similar definitions. In the light of this well-recognized significance of the red flag, it may be assumed that the legislature regarded it as a symbol of ideas hostile to established order, and decided that its carrying in parades would be likely to provoke turbulence or to menace the safety of travelers or citizens in general, or otherwise to interfere with the common welfare. Its determination in this regard cannot be pronounced by the courts contrary to the fundamental law, as being arbitrary or unreasonable, or as having clearly no relation to the ends for which the police power may be exercised."

DRINKING BY JURY OF BEER INTRODUCED IN EVIDENCE AS EXHIBITS AS PREJUDICE WARRANTING REVERSAL OF VERDICT.—The inability of the jury in State *v.* Applegate, (N. D.) 149 N. W. 356, to resist the temptation to drink up the exhibits led to a reversal of the judgment. The holding in that case was to the following effect: The deliberations of a jury in a criminal action are presumed to continue, not only up to the time that their verdict is signed and agreed upon, but long enough to allow their polling, if a poll is desired, and prejudice will be presumed to the defendant where it is shown that three bottles of beer, which were introduced in evidence in a prosecution for maintaining a common nuisance under the liquor laws of North Dakota, and which were taken by the jury into their room, were found empty at the time that such jury reported that they had arrived at a verdict; and where such prejudice has not been overcome by competent evidence a reversal will be ordered, even though the taking of the exhibits into the jury room was not objected to by the counsel for defendant. The opinion written in the case was in part as follows: "If the jury drank the contents of the bottles in order to test its qualities as an intoxicant they clearly violated the law, as they had no right to try any such experiment. . . . Even if they drank it from a spirit of bravado, prejudice will be presumed. There is no merit in the contention of counsel for the state that in this case there was no proof that the contents of the bottles was drunk during the deliberations of the jury, or before they had signed their verdict. The affidavit of the bailiff clearly shows that it was drunk before the jury notified him that they had arrived at a verdict, and their deliberations in the eyes of the law must be presumed to have continued not only up to such time, but up to the time that their verdict was returned in open court, and in fact until after the jury had been polled if a poll had been demanded. Up to this time, indeed, any juryman might have withdrawn his signature and repudiated his action. It is not even necessary to decide the case on the ground that the jury wrongfully experimented with the evidence. Both parties have a right to the cool, dispassionate and unbiased judgment of each juror, and the rule seems to be well established that prejudice will be pre-

sumed if liquor is drunk after the jury has retired to consider the case."

PHYSICIAN GIVING TO MEDICAL ASSOCIATION NAMES OF PATIENTS WHO WERE SLOW TO PAY, WHETHER GUILTY OF LIBEL.—An interesting illustration of what constitues a privileged communication occurs in McDonald *v.* Lee, (Pa.) 92 Atl. 135. This was an action of trespass in which the plaintiff sought to recover damages for an alleged libel. It appears from the record that a number of physicians in a particular community determined to prepare, for their own use, a list of the names of patients who were slow in making payment for medical services rendered to them. The information was for the benefit of the members only of the medical association, and there was no understanding between them that professional services should be refused to those whose names appeared upon the list. The defendant was a member of this association, and she furnished to the secretary, among other names of persons whom she regarded as able to pay, but who were slow in making payment for services, the name of the plaintiff. The list of names thus reported as slow pay was printed by the association, with the number of the physician who furnished the name added. There was nothing upon the face of the publication to indicate its purpose, and no one but a member could understand its meaning. The publication was considered confidential, and was limited to the members of the medical association. In plaintiff's statement of claim there was no averment of any special damage to plaintiff resulting from the publication, nor was there any proof of such damage. Upon the trial, at the close of the testimony, the trial judge gave binding instructions in favor of the defendant, upon the ground that the communication was a privileged one, and there was no evidence of malice, nor was any special damage shown. There was a judgment for the defendant which was affirmed on appeal. The court in affirming the judgment used language as follows: "The alleged libel was a communication made in confidence to and for the exclusive use of the members of the Carlisle Medical Club. It had reference only to the manner in which plaintiff made payment for services rendered. It does not appear that, by reason of the report, credit was refused to plaintiff, or that any member of the association refused to serve him in a professional way. It was the duty of the court to determine whether or not the words used were libelous *per se*. If they were not, then, in the absence of averment of special damage, binding instructions were proper. We can see no sufficient ground for holding the publication to be libelous *per se*. If it became actionable by reason of some special damage occasioned thereby, that fact should have been alleged in the declaration, and proof thereof should have been offered upon the trial. It was shown that the words here used with respect to the plaintiff did not go beyond imputing to him slowness in the payment of his bills, and under the evidence it can hardly be claimed that he was prompt in the discharge of that duty. The accusation was not so serious in its character as to be fairly regarded as in itself libelous, and, if any injury was occasioned to plaintiff thereby, it does not appear from the testimony. The good faith of the defendant in making the communication was not questioned. She had an interest in the subject matter, and the communication was made to persons having a corresponding interest in the subject."

CIVIL LIABILITY OF CATHOLIC BISHOP FOR RAPE COMMITTED BY PARISH PRIEST.—In Carini *v.* Beaven, (Mass.) 106 N. E. 589, which was an appeal from a judgment sustaining a demurrer to a declaration, it appeared that the plaintiff sought to hold the defendant liable for damages on the ground that he appointed as his agent to take charge of a parish of the Roman Catholic Church in Milford, to care for the property of the defendant in that parish and to perform the pastoral and religious duties of a priest therein, one Petrarca, a man who, it was averred, was "of low moral character," "of vicious and degenerate tendencies and gross sexual proclivities." She averred that the defendant made this appointment with full knowledge of the bad character and evil tendencies of Petrarca, and knew or in the exercise of reasonable care ought to have known that the appointment of such a man to such a position was dangerous and likely to result in attempts of said Petrarca "to debauch and carnally know the female members of said parish, and that by reason of such confidential relations between such agent and priest and such members of the parish such attempts would be successful." She averred that while she was a member of the parish, "not quite eighteen years of age, innocent and confiding," and while she was engaged alone "in the act of a religious service in the Church of the Sacred Heart parish, said church being the property of the defendant," Petrarca, being the agent of the defendant and "occupying the position of the defendant's moral and religious instructor to the people of said parish, guarding the morals of the young of said parish, and sustaining said confidential relations with the members thereof," dragged her from the altar to the vestry of said church, assaulted and overcame and debauched her, in consequence whereof she afterwards gave birth to a child. And she averred that all her injuries and sufferings resulted from and were caused by the defendant's negligent appointment of said Petrarca as his agent and priest in said parish. On a consideration of this declaration the Supreme Court affirmed the judgment of the court below on the ground that the declaration did not state a cause of action. Judge Sheldon wrote the opinion of the court which was in part as follows: "The gravamen of the plaintiff's charge is that the defendant negligently put or retained in the position of a parish priest one whom he knew or in the exercise of proper care ought to have known to be a man of bad character and of gross sexual proclivities, who he knew or ought to have known would be likely to attempt successfully to debauch the female members of the parish, and that this man committed upon the plaintiff what must upon the language of her declaration be taken to have been a rape. In other words, her claim is that the defendant appointed an unfit man; that this appointment was apt to give and did give to the appointee opportunities to seduce women; and that the appointee, by means of these opportunities, committed a rape upon the plaintiff. It would be difficult for the plaintiff in any event to maintain such an action. Upon elementary principles she could not do so without proving that the negligence of the defendant in appointing or retaining an unfit man was the direct and proximate cause of the injury to her. But according to her allegations the injury to her was done by Petrarca entirely outside the scope of his alleged agency or of his duties; it was a crime committed of his own free will, the result of his own volition, for which no one but himself was responsible. The criminal act of the alleged agent was itself the efficient cause of the plaintiff's injury. . . . Upon the plaintiff's averments the defendant had no reason to apprehend that Petrarca would do more than to seek to seduce the women of his parish into acts of adultery or fornication; and flagitious as such acts would be, they could afford no ground of action to a woman who, under whatever stress of temptation, had shared in their commission."

DRAWING OF VIRULENT GERMS INTO BRAIN BY NASAL DOUCHE AS ACCIDENT.—A case containing unusual facts is that of Smith *v.* Travelers' Ins. Co., (Mass.) 106 N. E. 607. The suit was

on an accident policy and was brought by the representative of the policy holder who had died. The policy insured the deceased against "bodily injuries effected directly and independently of all other causes, through external, violent and accidental means" and against death resulting "from such injuries alone." The question in issue was whether the death of the policy holder was within the terms of the policy. The death was due to spinal meningitis. This disease, according to the plaintiff's evidence, was caused by the presence of streptococcus germs in the brain. The germs had penetrated into the brain from the middle ear through a hole in the mastoid bone. They had been carried into the ear from the outer nose, through the Eustachian tube, by a nasal douche which the deceased was using for catarrh, as he had been in the habit of doing, and which on this occasion he had "sniffed" or drawn into his nostril less gently or harder or more violently than he usually did. It was shown that streptococcus germs were among the most virulent and dangerous germs known; but they were found somewhat frequently in the outer nose, and might remain there indefinitely without harm. The nasal douche used by the deceased was harmless in itself; but the harm was done by the fact that he drew it too violently into his nostril, by reason whereof it reached the Eustachian tube and was carried into the middle ear, and thence penetrated into the brain. The evidence further showed that a hole or perforation in the mastoid bone through which pus or germs could pass from the ear into the brain was a very rare occurrence. On these facts it was held that the death was not within the contemplation of the policy. The court said: "In an ordinary civil action under like circumstances, there would be no difficulty in saying that there could be found to have been an unbroken string of causation between the too violent inhalation of the nasal douche and the ensuing death. The too violent inhalation carried the streptococcus germs with the douche into the Eustachian tube, and everything else followed naturally. The presence of these germs in a place where, however virulent in themselves, they were harmless, and the existence of the perforation in the mastoid bone, could be found to have been conditions rather than operating causes of the illness and death. If therefore it can be said that this too violent inhalation effected a bodily injury through 'external, violent, and accidental means,' that it was itself such a means of injury, the first and chief obstacle to the plaintiff's recovery would be removed. This is the doctrine of many of the decisions relied on by her. . . . But there was nothing accidental in the inhalation of this douche. The deceased did exactly what he intended to do. This particular act of inhalation, though harder or more violent than usual, was not, so far as appears, harder or more violent than he intended it to be. There was no shock or surprise during the inhalation which made him draw a deeper breath than he intended to draw, nothing strange or unusual about the circumstances. The external act was exactly what he designed it to be, though it produced some internal consequences which he had not foreseen. Accordingly there was no bodily injury effected through a means which was both external and accidental. But it is only for a death resulting from injury effected through such means that the defendant is made responsible by the policy. It is not sufficient that the death or the illness that caused the death may have been an accidental result of the external cause, but that cause itself must have been, not only external and violent, but also accidental."

LIABILITY OF RAILROAD MAINTAINING RESTAURANT, FOR LOSS OF OVERCOAT OF CUSTOMER.—In Gilson *v.* Pennsylvania R. Co., (N. J.) 92 Atl. 59, the Pennsylvania Railroad Company was the defendant in an action brought to recover the value of an overcoat which disappeared after plaintiff had hung it upon a hook a few feet from where he had seated himself in the defendant's restaurant. At the trial it appeared that the defendant's restaurant was at its terminal in Jersey City, and was of the "quick lunch" type. It was about sixty feet long by about forty feet wide. It consisted of a counter in the center of the room, somewhat in the shape of a horseshoe, around which on the outside were provided stationary stools on which patrons might sit while eating lunch. There were no tables or chairs. Three or four "clothes trees" were provided about twenty-five feet apart around the room. There was no checkroom, but the cashier would if requested, and sometimes did, take charge of overcoats for patrons. In conspicuous places on the walls were a number of printed notices, about eighteen inches long and about fourteen inches wide, containing the words "Not responsible for loss of coats, hats, umbrellas," etc., the letters being from an inch and a quarter to an inch and a half in height. The signs were near the clothes trees, and were of sufficient size to be seen across the room. The plaintiff had patronized the defendant's restaurant almost daily for twenty years. On the day in question the plaintiff entered the restaurant and hung his coat on one of the clothes trees a few feet back of the stool on which he seated himself to eat his lunch, and after he had finished eating he discovered that his coat, which was comparatively new, was missing, and that in its place was another coat approximately the same size as plaintiff's, but showing much evidence of wear. He then reported the loss to the steward. Plaintiff hung up the coat himself. He did not ask the cashier to take charge of it, nor did he place it in the physical possession of anybody connected with defendant's restaurant, nor did he in any way bring his coat to the attention of any of the defendant's servants or employees until after the coat had disappeared. The first that defendant knew anything about the coat was after its loss. Plaintiff testified that his coat was within reach, and that he could go to it and take anything from the pockets, or otherwise use the coat without requiring any act on the part of the defendant or its servants. The trial judge, sitting without a jury, gave judgment for the plaintiff, but on appeal the judgment was reversed and a new trial awarded on the ground that the plaintiff failed to show that the defendant was guilty of any breach of duty, as there was no bailment. The court said: "We agree with the trial judge that, under the proofs, 'the right to recover depends on whether the defendant became bailee of the plaintiff's overcoat,' but we do not agree that there was a bailment. . . . The presence of the clothes trees may be regarded as an invitation to the patron to hang his coat upon them if he saw fit. Obviously they were there for the convenience of the patron if he wished to lay aside his coat while eating, and yet not part with the control thereof. That the plaintiff chose to do. Clearly he did not thereby transfer the exclusive possession of the coat to the defendant. The defendant had no knowledge of the transaction, and was not in any wise apprised that it was to be the bailee of the coat or charged with its safekeeping. If, on the other hand, the plaintiff had chosen to part with the control of his coat and to charge the defendant with the duties and responsibilities growing out of the relation of bailee, he might have done so by transferring the exclusive possession thereof to the defendant. This he could have done by requesting the cashier to take charge of his coat as other patrons sometimes did. It is true that the plaintiff testified that he did not know of such custom. But this, we think, considering his familiarity with the restaurant, merely emphasizes the fact that the plaintiff always preferred to keep his coat under his own control."

New Books.

Bender's War Revenue Law. By the Publisher's Editorial Staff. Pp. 181+xxviii. Albany: Matthew Bender & Co. 1914. $2.00.

The volume at hand contains the text of the new revenue law of 1914, many of the sections being annotated with reference to earlier acts and to other extant laws. In an introductory chapter the publishers say: "The Act of 1914 is so substantially a re-enactment, though with many omissions, additions and alterations, of the Act of 1898, and this emergency legislation is to such extent a thing apart from the main and relatively permanent body of internal revenue law, that it will best and most promptly serve the needs of the legal profession and the public to have a manual specifically devoted to these temporary measures, with appropriate reference to the permanent system, which has its own literature, and to the Act of 1898. The present book covers more particularly the special or license taxes, the stamp tax and other features of the emergency legislation, with references to the general provisions which are applicable from the Revised Statutes and other laws. The 'world situation' is such that, as was intimated in the congressional debates on the Act, not only may these emergency taxes be extended, but further features of earlier excise legislation may have to be revived. In view of this, as well as because it is generally illustrative, some of the relevant older material is retained in this book in a condensed form." An examination of the notes show that they furnish considerable aid in construing the text and are otherwise helpful and suggestive. A summary table of taxes at the end furnishes instant information of the articles taxed, and the amount of the taxes. There is moreover a condensed catchline index to the act which enables one readily to find what he is seeking. This is in addition to the regular index, which seems sufficient to meet the needs of the reader.

New Jersey Employers' Liability Law. By William E. Holmwood of the Essex County Bar. Pp. 227. Plainfield, New Jersey: The New Jersey Law Journal Publishing Co. 1914.

We have here the New Jersey Employers' Liability Law of 1911, together with all amendments and supplements, notes of New Jersey and English decisions, the British Workmen's Compensation Act of 1906, and a collection of forms. Mr. Holmwood states his reason for incorporating English decisions and statutes in the volume, in language as follows: "As some of the important provisions of the New Jersey Act were taken from the British Workmen's Compensation Act, 1906, in some cases the exact, and in others similar, language being used, the decisions of the higher courts of England are very helpful in construing the statute. . . . In order to aid the practitioner to fix the true scope of the English decisions, the text of the British Act, 1906, has been incorporated as an Appendix to this work." The notes indicate an intelligent appreciation of the purport of the decisions construing the various provisions of the text, and while somewhat brief furnish a satisfactory digest for ready reference.

The Juvenile Court and the Community. By Thomas D. Eliot, M.A., Ph.D. Pp. 234. New York: The Macmillan Company. 1914. $1.25 net.

This volume is one of several handbooks in the American Social Progress Series, edited by Samuel McCune Lindsay, Ph.D., LL.D., of Columbia University. They are intended for the student and general reader. The author states that "it is not the purpose of this book to portray the reform of boy gangs, nor to describe in detail standards or practice of courts and probation officers. Its object has been to treat the juvenile court in its relation to other social institutions, as a problem in social economy. The time has come to study the movement in its perspective, and judge its results and prospects in a broader way than is done in most books on the subject. Just because so much was expected of the juvenile court, it has recently been the object of criticism. How widespread this criticism has been is known only to the few in close touch with the several courts. Not only the Denver and Chicago courts, conspicuous because of their position as pioneers, but those of Boston, New York, Philadelphia, Baltimore, Washington, Pittsburgh, Buffalo, Columbus, Cincinnati, Louisville, Indianapolis, Chicago, Milwaukee, Denver, Salt Lake City, and other localities have undergone criticism ranging from serious disapproval among local social workers to open attack. Many a court is right in complaining of 'peculiar problems'—for every city is different—but is mistaken if it thinks itself peculiar in having a problem. The following book is an attempt to show how far public dissatisfaction has been warranted, and further to indicate how the juvenile court can justify itself in the face of these attacks." Such subjects are discussed as stages in the juvenile court movement; the courts' present status; politics versus such court; the place of volunteer probation; co-operation; dependency jurisdiction of the court; placing out by juvenile courts; the diagnosing clinic; the place of the court in American criminology; the field of special education; a modal criminology; the present task of the court; and the court as community index. Mr. Eliot, while satisfied that the juvenile court as an experiment has been amply justified, is of opinion that the movement, like the Settlement movement or the Charity Organization movement, must lead to something more thoroughgoing. In fact he says that the present functions of the juvenile court and its probation office could and should be performed by the school and the domestic relations court. Speaking of the duty of a police officer with respect to juvenile offenders Mr. Eliot says: "When it is possible to avoid it, no child should be arrested by a regular police officer. Assuming the theory of juvenile irresponsibility, even delinquency, as being due in a sense to some kind of neglect, is a condition for which parents rather than children are accountable so long as they retain the rights of parents over their children. If therefore it is necessary for children to be brought to court, they should be brought on petition by their parents or duly qualified social agents. The police are quite within their functions, however, in arresting any child, *flagrante delicto*, violating order or in juring others; and a large part of the juvenile court's business will, of course, always be brought in in this way. The police should attempt, besides, to hold back cases as long as possible by warning or by taking the child to its home, without a court experience." Social workers and others will find Mr. Eliot's volume interesting reading, and his criticisms and suggestions might well be given careful consideration.

Property and Contract in Their Relations to the Distribution of Wealth. By Richard T. Ely, Ph.D., LL. D., Professor of Political Economy in the University of Wisconsin. Pp. 474 +xlvii. New York: The Macmillan Company. 1914. Two volumes. $4.00.

Professor Ely is well known as a teacher, but probably better known as a writer. Social science is, and has been, his field, and for many years he has been a valued contributor to the elucidation of that subject. The present work is no doubt his most important and is bound to enhance considerably his already excellent reputation as an authority in Economics. It would appear from the author's preface that the contents of these two

volumes were not intended primarily for the public but for his classes in the University of Wisconsin, and that the material is presented to the public substantially as it has been presented to his students for many years. This is seen from the following quoted paragraph taken from the preface: "The lectures on Property and Contract were written more than ten years ago, and as early as 1899 many parts of the book were substantially in their present form. The work of revision has consisted to no inconsiderable extent in removing more recent additions. One great part of the lectures, namely that on Landed Property, has been cut out and reserved for treatment in subsequent volumes, namely those on Landed Property and the Rent of Land. In some places I am obliged to refer to this forthcoming work in order to explain a lack of treatment of topics which otherwise would be expected." The first volume is given up to several introductory chapters devoted to Distribution, followed by chapters devoted to Property, Public and Private. The early chapters in the second volume are likewise devoted to Property, and then follow chapters relating to Contract and its conditions. There are several appendices, and at the end of each chapter there are adequate notes where are found the authorities on which the text is based. Professor Ely has made free use of judicial decision especially in his chapters on Contract. A notable case considered by him at some length is Lochner *v.* New York, 198 U. S. 45, which held unconstitutional a New York statute regulating the hours of labor of bakers. We do not suppose that the author of these volumes intended their use to be confined to the class room, and they will undoubtedly appeal to lawyers and others who are no longer students in the narrow sense. The publishers have done their part exceedingly well, the mechanical features of the books being beyond criticism.

International Trade and Exchange. A Study of the Mechanism and Advantages of Commerce. By Harry Gunnison Brown, Instructor in Political Economy in Yale University. Pp. 197 +xviii. New York: The Macmillan Company. 1914. $1.50 net.

The aim of this book has been to cover the theory of international and intranational trade, with due consideration of the exchange mechanism of such trade, and with reference to the effects of government interferences with trade. Part I deals with the subject of Foreign Exchange, though it contains two introductory chapters on Laws of Money and the Nature of Banking. Part II begins with a discussion of the gains of trade, whether the trade is between countries or wholly within a single country. Attention is then turned to the conditions determining the share which each of two or more countries gets from trade between them. The remainder of Part II is devoted to a consideration of revenue tariffs, protective tariffs, bounties, navigation acts, government construction of canals for the free use of commercial interests, land grants in encouragement of railroad building, etc. Mr. Brown has produced an admirable text book on the subjects treated. He had a hard task before him, for he was necessarily dealing with complex questions, but his presentation is clear, and what is more, interesting. A summary of each chapter appears at the end thereof, and this innovation helps to impress on the mind the important things considered.

"With proper care on the part of the driver, there is no danger in crossing a railroad with an automobile upon an ordinary highway in a country town." *Per* Knowlton, C.J., in Chase *v.* New York Cent. etc., R. Co. 208 Mass. 137, 146, 94 N. E. Rep. 377, 381.

News of the Profession.

THE KANSAS BAR ASSOCIATION will hold its annual convention at Topeka on January 27 and 28.

THE ILLINOIS STATE BAR ASSOCIATION has decided to hold its next meeting, the thirty-ninth annual meeting, at Quincy on June 11 and 12.

NEW CALIFORNIA JUDGE.—Harry T. Dewhirst of Redland has been appointed a judge of the California Superior Court by Governor Johnson.

NAMED UNITED STATES ATTORNEY.—John A. Fain of Lawton, Okla., has been appointed United States Attorney for the western district of Oklahoma.

THE OKLAHOMA STATE BAR ASSOCIATION held its annual meeting at Tulsa on December 28 and 29. Further particulars will be given in LAW NOTES for February.

OHIO JURIST DIES SUDDENLY.—Associate Justice Wilkin of the Supreme Court of Ohio died suddenly at New Philadelphia, O., on December 4, of heart failure.

MUNICIPAL JUDGE NAMED.—State Senator Maurice Bernstein has been appointed judge of the Municipal Court of Cleveland, Ohio, to succeed Manuel Levine, resigned.

NAMED JUDGE IN IOWA.—Governor Clarke of Iowa has appointed Seneca Cornell of Ottumwa to succeed the late Frank W. Eichelberger as judge of the Iowa Circuit Court.

CONVENTION OF WASHINGTON PROSECUTORS.—The fifth annual meeting of the Washington State Association of Prosecuting Attorneys was held at Spokane on December 11 and 12.

APPOINTED JUDGE OF CITY COURT.—Senator-elect Marion H. Sims has been appointed judge of the city court of Talladega, Ala., to succeed Judge Cecil Brown, resigned.

APPOINTED ASSISTANT ATTORNEY GENERAL.—C. C. McDonald of El Paso has been appointed assistant attorney general to represent the state before the Texas Court of Criminal Appeals.

NAMED DISTRICT JUDGE IN MINNESOTA.—W. L. Converse of South St. Paul has been appointed judge of the first judicial district of Minnesota to succeed the late Judge William Hodgson.

APPOINTED MEMBER OF STATE TAX COMMISSION.—Governor Eberhart has appointed Judge James T. Hale of Deerwood a member of the Minnesota State Tax Commission to succeed M. O. Hall, deceased.

ASSISTANT TO UNITED STATES ATTORNEY NAMED.—United States Attorney Laskey of the District of Columbia has appointed James B. Archer an Assistant United States Attorney to fill a vacancy.

PROBATE JUDGE APPOINTED IN OHIO.—George W. Tehan of Springfield has been appointed probate judge of Clark County, Ohio, to fill out the unexpired term of Judge F. W. Geiger, who has been elected Common Pleas judge.

WEST VIRGINIA BAR ASSOCIATION.—The thirteenth annual meeting of the West Virginia Bar Association was held at Parkersburg on December 20-23, 1914. Further mention of the gathering will be made in the next issue of LAW NOTES.

APPOINTED ATTORNEY FOR INTERSTATE COMMERCE COMMISSION.—Frank G. Smith of East St. Louis, Ill., has been appointed attorney for the Interstate Commerce Commission. His

territory will include Illinois, Michigan, Wisconsin, Louisiana and Arkansas.

APPOINTED TO BENCH IN PENNSYLVANIA.—Governor Tener of Pennsylvania has appointed J. Davis Brodhead of South Bethlehem judge of the courts of Northampton County, succeeding Judge Russell C. Stewart, who becomes president judge in place of the late Henry W. Scott.

CHANGES IN IDAHO JUDICIARY.—Alfred Budge of Pocatello, judge of the fifth judicial district of Idaho, has been appointed to the bench of the State Supreme Court to succeed Justice George H. Stewart, deceased. John J. Guheen, assistant attorney general, has been appointed district judge to succeed Judge Budge.

KENTUCKY JUDGE DIES.—Jude William Samuel Pryor died at New Castle, Ky., on November 18, aged 89 years. Judge Pryor was for twenty-five years a member of the Kentucky Court of Appeals and at one time its Chief Justice. He had previously served five years as Circuit Judge.

CHANGES IN MISSOURI PUBLIC SERVICE COMMISSION.—William W. Woerner of St. Louis has resigned as a member of the Missouri Public Service Commission. E. J. Bean, of De Soto, who was counsel for the Commission, has been appointed to succeed Mr. Woerner, and State Senator W. G. Busby of Carrollton has been appointed counsel to succeed Mr. Bean.

TEXAS JUDICIARY CHANGES.—Justice Ocie Speer of the Texas Civil Court of Appeals for the Second supreme judicial district has resigned from the bench, and Governor Colquitt has appointed Judge R. H. Buck of Fort Worth as his successor. Bruce Young of Fort Worth has been appointed to succeed Judge Buck on the bench of the Forty-eighth district court.

DEATH OF WEST VIRGINIA JURIST.—Judge Henry Brannon, one of the most widely known and prominent jurists of West Virginia, died at Weston, W. Va., on November 24, aged 76 years. Judge Brannon served as Circuit Judge from 1880 to 1888, when he was elevated to the State Supreme Court of Appeals. He sat continuously as a member of that court for twenty-four years, retiring in 1912.

OHIO ATTORNEY-GENERAL MAKES APPOINTMENTS.—Edward C. Turner, the newly-elected attorney-general of Ohio, has made the following appointments: Freeman T. Eagleson of Akron, Charles H. Duncan of Urbana, and Hanby R. Jones of Columbus, to be assistant attorneys general; Lawrence K. Langdon of Warren County, to be special counsel to the state utilities commission, succeeding Joseph A. McGhee; Marshall G. Fenton, city solicitor of Chillicothe, to succeed Joseph Stanton as Chief Clerk to the Attorney General.

NEVADA STATE BAR ASSOCIATION.—At the annual meeting of the Nevada State Bar Association, held at Reno on November 20 and 21, the following officers were elected for the ensuing year: President—Robert G. Withers, Reno; vice-presidents—Charles S. Chandler, Ely, and W. D. Hatton, Goldfield; secretary—E. F. Lunsford, Reno; treasurer—Robert M. Price, Reno. At the banquet on the closing evening of the session, toasts were responded to as follows: "The Constitution of the United States," by Judge A. F. Cheney; "Respect for the Law," by J. A. Sanders, district attorney of Nye County; "Appointment of Judges," by H. M. Hoyt; "The Bench, the Bar and the Public," by Supreme Court Justice Talbot; "The Law and the Lady," by Judge R. C. Stoddard.

OREGON BAR ASSOCIATION.—The annual meeting of the Oregon Bar Association was held at Portland on November 17 and 18. The President's address was delivered by Judge R. S. Bean. Other addresses were as follows: "Progress and the Reign of Law," by Judge Guy C. Corliss, Portland; "The Blue Sky Law," by Corporation Commissioner Ralph Watson; "Public Opinion as an Element in Judicial Decisions," by Judge George Donworth, of Seattle; "Employers' Liability Act," by Harvey Beckwith. The following officers were elected: President, A. E. Bennett, of The Dalles; secretary, Albert B. Ridgeway, of Portland; treasurer, C. D. Mahaffie, of Portland; vice-presidents, first district, F. M. Calkins, of Medford; second district, J. W. Hamilton, of Roseburg; third district, Percy R. Kelly, of Albany; fourth district, G. N. Davis, of Portland; fifth district, J. U. Campbell, of Oregon City; sixth district, G. W. Phelps, of Pendleton; seventh district, W. L. Bradshaw, of The Dalles; eighth district, Gustav Anderson, of Baker; ninth district, Dalton Briggs, of Ontario; tenth district, J. W. Knowles, of La Grande; eleventh district, David R. Parker, of Condon; twelfth district, Webster Holmes, of Tillamook; thirteenth district, George Nolan, of Klamath Falls; executive committee, R. W. Montague, O. C. Spencer, Ben C. Dey, W. M. Davis, R. A. Leiter, of Portland; C. L. McNary, of Salem, and E. R. Bryson, of Eugene.

CALIFORNIA BAR ASSOCIATION.—The fifth annual meeting of the California Bar Association was held at Oakland on November 19, 20 and 21. W. J. Hunsaker delivered the president's address, and Hon. Walter Bordwell of Los Angeles delivered the annual address, his subject being "The Judges of Our Courts." Papers were read by Chief Justice Sullivan of the California Supreme Court, on "The Law's Delays and Remedies Suggested," and by Walton J. Wood, public defender of Los Angeles County, on "The Place of the Public Defender in the Administration of Justice." Memorial services were held for Chief Justice W. H. Beatty, late of the State Supreme Court, Charles S. Wheeler of San Francisco paying tribute to the memory of that eminent jurist. Officers were elected as follows: President—Robert M. Fitzgerald, Oakland; first vice-president, Eugene Daney, San Diego; second vice-president—Frank H. Short, Fresno; third vice-president—A. E. Bolton, San Francisco; treasurer—H. C. Wyckoff, Watsonsville; secretary—T. W. Robinson, Los Angeles; executive committee—R. M. Fitzgerald, Eugene Daney, H. C. Wyckoff and T. W. Robinson, ex-officio members; J. P. Chandler, Los Angeles; A. F. Jones, Oroville; Henry Eickhoff, San Francisco; C. E. McLaughlin, Sacramento, and Sam Ferry Smith, San Diego.

English Notes.

WEARING UNIFORMS IN COURT.—The liberty accorded by the Bench to members of the Bar who are actually engaged in military service, in the present exceptional circumstances, of pleading in court, at their option, in Bar costume or regimentals is not without precedent. In Ireland in the era of the volunteer movement from 1778 till 1782, and again during the rebellion of 1798, counsel were given audience in court when attired in the uniform of the volunteers. Mr. William Saurin, the acknowledged leader of the Bar, who was subsequently from 1807 till 1822 Attorney-General for Ireland and had the refusal of the Irish Lord Chief Justiceship and a peerage, was in 1798 colonel of the Barristers' Corps of Volunteers, whom he at times paraded in the hall of the Four Courts, Dublin, in their uniform,

which, unlike the sombre court attire of the Bar, was very brilliant.

GRETNA GREEN RECORDS.—Dr. Glaister, professor of forensic medicine in the University of Glasgow, speaking in Edinburgh, recently, made two interesting statements. One was that the Constitution of Oxford was written at Buittle in Galloway, and the other had reference to the Gretna Green registers. The professor said that he had tried to do some service for the state in endeavoring to secure some records of Gretna Green marriages. He happened to be vice-chairman of the historical section of the last Glasgow Exhibition, and, as such, he had the custody of two authentic volumes of the registers of Gretna Green marriages. Not a few notable families entered the realm of matrimony in that particular way. Records of these marriages belonged to an old woman, which seemed to be the only thing she could turn into money, and he was negotiating with her about them, when her "cute Yankee nephew," hearing of that, bought them at a less sum than the state was prepared to give her. The Gretna Green records were now in America.

REMINISCENCES OF LORD STOWELL.—It is interesting to recall that Lord Stowell, whose decisions in prize cases have in these days acquired a fresh significance after having had for many years a merely academic value, was an intimate friend of Dr. Johnson and indeed was named one of the executors of Johnson's will. As Mr., and, later, Dr. Scott, he appears frequently in Boswell's pages. We are there told that on Easter Day, 1781, in conversation with Johnson and Boswell, he related that "Blackstone, a sober man, composed his Commentaries with a bottle of port before him; and found his mind invigorated and supported in the fatigue of his great work by a temperate use of it." This anecdote seems not to have pleased Blackstone's relations, and, according to Prior's Life of Malone, Scott wrote to the family to apologize for allowing the story to get into Boswell's work. On another occasion Scott irritated Johnson. This was when, apropos the death of Lord Lichfield, he said to the doctor: "What a pity it is, sir, that you did not follow the law! You might have been Lord Chancellor of Great Britain and attained to the dignity of the peerage; and now the title of Lichfield, your native city, is extinct, you might have had it." Johnson was much agitated, and in an angry tone exclaimed, "Why will you vex me by suggesting this when it is too late?" Some of his reminiscences of Johnson, written for incorporation in Croker's much-maligned edition of Boswell, had a curious fate. Sent by Croker to Sir Walter Scott for perusal, they were stolen in transit and never recovered, and Stowell, now an old man, apparently could not be bothered to rewrite his notes. It may be added that the sketch of Lord Stowell which appears in the Dictionary of National Biography is from the pen of the present Lord Sumner, who says of him: "As a judge he stands in the front rank with Hale and Mansfield, and his services to maritime and international law are unsurpassed."

GUILTY WIFE ALLEGED TO BE MAINTAINED BY CORESPONDENT.—Parties to a divorce suit are made competent witnesses by section 3 of the Evidence Further Amendment Act 1869 (32 & 33 Vict. c. 68), though they are not bound to answer any question tending to show that they have been guilty of adultery. The provisions of that section came prominently into discussion in the recent case of Bass *v.* Bass and Bianchi. Cross-examination as to means is authorized by rule 191 of the Divorce Rules. But never before the present case seemingly has cross-examination of a guilty wife been allowed on the issue whether she is being maintained by the corespondent. It appears, however, from the decision in Maden *v.* Maden and De Thoren, 18 L. T. Rep. 337, 37 L. J. 10, P. & M., that if a husband can prove that his wife has sufficient means of support independently of him, even though they be derived from the corespondent, she will not be entitled to an allotment of alimony. As to such an allotment *pendente lite*, it is for the purpose of supplying the wife with means until decree absolute is granted (Wells *v.* Wells, 3 Sw. & Tr. 542; Ellis *v.* Ellis, 49 L. T. Rep. 223, 8 P. Div. 188; see further, Dunn *v.* Dunn, 59 L. T. Rep. 385; 13 P. Div. 91). But if she already has means of support, no alimony *pendente lite* is required. And in Holt *v.* Holt and Davis, 16 L. T. Rep. 662; L. Rep. 1 P. & M. (610) it was refused on the ground that the respondent was being supported by the corespondent. It is noticeable, however, that in that case the respondent did not deny the charge of adultery. In the present case, the object of the husband in making the application was to ascertain whether the wife was disentitled to alimony *pendente lite* because she had other means of support. (Eaton *v.* Eaton and Campbell, 21 L. T. Rep. 733; L. Rep. 2 P. & M. 51.) There cannot be the remotest doubt, therefore, that the Court of Appeal, consisting of Lords Justices Kennedy and Swinfen Eady, were perfectly right in affording the husband the opportunity that he sought.

LOAN FRAUDULENTLY OBTAINED BY INFANT.—The existence of some process whereby money can be recovered from an infant, which has been advanced to him by a registered moneylender on the fraudulent misrepresentation that he is of full age, is what one would certainly have expected to be able to discover. That is the assumption which would occur to the minds of many who venture to reckon themselves not altogether outside the pale of erudite lawyers. The decision of the Court of Appeal, therefore, was needed to establish that that is an erroneous impression. And it was in the recent case of R. Leslie Limited v. Shiell (111 L. T. Rep. 106) that any notion of the sort was exploded. As appears from the headnote to the report, an infant who has thus acted is not liable to repay the loan either as damages for fraudulent misrepresentation, or as money had and received by him to the use of the lender, or on the ground that he is compellable in equity to refund the money which he has obtained by fraud. Such was the somewhat startling conclusion arrived at by the Court of Appeal, consisting of Lord Sumner, Lord Justice Kennedy, and Mr. Justice A. T. Lawrence—an undisputably strong court, as all must fain avow—after a close examination of the authorities on the subject as detailed in their considered judgments. Mr. Justice Horridge, on the other hand, sitting in the court of first instance, was apparently of opinion that certain of the authorities admitted of its being held that a court of equity would order restitution to be made by an infant who had obtained property by fraud, and would not allow him to retain what he

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and actually received and *profanely* borrowed. And the arm of the court seems to be strangely wanting in length if it does not possess that power. But that it has such was negatived by the learned judges of the Court of Appeal, although, as was remarked by Lord Sumner, the rule in equity has been so stated at times by text-writers, both remote and recent. It will strike most persons that a prompt amendment of the law is essential.

Obiter Dicta.

A CARD GAME.—*Pons v. Pons*, 132 La. 370.

ANSWERING BACK.—*Pennock v. Dialogue*, 2 Pet. (U. S.) 1.

COMMANDEERING FOR SECRETARY OF STATE.—*U. S. v. Twenty Cases of Grape Juice*, 189 Fed. 331.

THE LEARNED PROFESSIONS.—"Burglary is a profession."—*See People v. Laird*, 102 Mich. 140.

THE WHOLE THING.—"Of this question the jury was the judge." *See Corbin Banking Co. v. Bryant*, 151 Ky. 198.

TAKING A FALL OUT OF MOSES.—"The only real fall of plaintiff was when he fell asleep."—*Per Provosty, J.*, in *Moses v. New Orleans Great Northern R. Co.*, 132 La. 1012.

OPTIONAL.—"Courts are allowed, if they so choose, to act like ordinary sensible persons."—*See Mangold v. Bacon*, 237 Mo. 513.

THE SWORD OF DAMOCLES.—"Plaintiff's showing of negligence hangs only on the eyebrows of a very weak and emaciated presumption."—*Per* Oldham, C., in *Thostesen v. Doxsee*, 78 Neb. 47.

A NATURE FAKIR.—"No doubt, by a splitting of frog hairs, it could be urged," etc.—*Per* Wanamaker, J., in *State ex rel. Maher v. Baker*, 88 Ohio St. 178.

A BLOODY SIMILE.—"The interpretation necessary to sustain the judgments below is of the sort that bleeds statutes to death and pulls the teeth out of remedial laws." *See State ex rel. Maher v. Baker*, 88 Ohio St. 179.

MIXED METAPHORS.—"It was a new and anxious question in the Julian case—'a virgin wearing all its maiden blushes.' Being new and anxious, it is there a bone of contention most learnedly picked bare." *See Meriwether v. Publishers*, 211 Mo. 199.

NOT "LABOR."—If the following is true, some people get paid pretty well for having a good time: "Baseball is essentially and naturally in the nature of amusement, both for the participants and spectators, and is far removed from the ordinary meaning of the word 'labor.'" *See Territory v. Davenport*, 17 N. Mex. 222.

LUXURIES.—"The law does not recognize the dreams, visions, or revelations of a woman in a mesmeric sleep as necessaries for a wife, for which the husband, without his consent, can be held to pay. These are fancy articles, which those who have money of their own to dispose of may purchase, if they think proper, but they are not necessaries, known to the law, for which the wife can pledge the credit of her absent husband." *See Wood v. O'Kelley*, 8 Cush. (Mass.) 408.

THE FLY IN THE OINTMENT.—The following kind words spoken by the Court in *People v. Hanrahan*, 75 Mich. 621, are calculated at first blush to be soothing to one's feelings: "Hard labor, in itself, is not infamous or degrading. On the contrary, it is ennobling, and is the foundation upon which reposes all true progress in mental and moral development.

> 'An angel's wing would droop if long at rest,
> And God himself, inactive, were no longer blest.'

The infamy and degradation consist in its being involuntary." On mature reflection, however, we are led to inquire whether hard labor is ever anything but involuntary.

155 IOWA.—Volume 155 of the Iowa reports is in a number of respects a very entertaining book. Space will not permit us to mention all that is good therein, so one or two brief extracts will have to suffice by way of illustration. On page 329, Judge Ladd begins an opinion thus: "The parties hereto were married in Bohemia, and reached Cedar Rapids with two babies and $40 in 1887." There is nothing like being brief in detailing facts. On page 333, Judge Weaver opens the discussion of a robbery conviction as follows: "George Hall and James Rice, having worked sufficiently long for each to acquire a pay check of $5.50, ceased from their labors and retired from business to enjoy their fortune." On page 445, Judge Weaver again steps into the limelight with this slap at choir singers: "Nor can we comprehend the process of reasoning that finds that the fact that a purchaser of liquor illegally sold is 'the leader of a church choir and sings at funerals' lends an odor of sanctity to the act of the illegal seller." Not to be outdone by the judges, the reporter contributes to the general hilarity by soberly declaring that the case reported at page 458 is a "suit to recover personal injuries." There is more in the book, but we will have to reserve it for a future occasion.

HUNGER AND CRIME.—State *v.* Allen, 23 Idaho 772, was an appeal from a conviction of robbery. The defendant assigned as error the refusal of the trial court to allow him to show that he was in a comfortable financial condition and therefore that there was no motive for a robbery. On this point the appellate court said: "The argument advanced in support of this assignment of error is that poverty and hunger and want are strong incentives to crime, and especially to the crime of robbery, and that since the state had shown in this case that the real crime that was planned and that defendants were trying to carry out was that of robbery, and that defendant was 'hard up and broke,' the defendant might show lack of motive to commit the crime of robbery by showing that he had plenty of money and property of his own and that he was not pressed by hunger or 'short' of money, as claimed by the state. Counsel cite the case of Jacob *v.* Esau, Gen. xxv, 29, as showing what hunger will drive men to do. This is persuasive, and there is an element of merit in the contention, but it would be a very dangerous rule to adopt and an erroneous conclusion to reach to suppose those who are hungry or 'broke' are the only ones who commit crime—even the crime of robbery. Of course, those who are in better circumstances frequently adopt an easier, more genteel, and less dangerous method of robbing their victims than that of going out with a six-shooter and holding them up, but the results accomplished amount to the same thing."

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Law Notes

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"Oslerizing" the Tangoist.

SOME one is always taking the joy out of life. When, now, under the influence of the seductive tango, one-step, and hesitation, many of our gray-beards are undergoing a process of rejuvenation, along comes a court decision that puts an age limit upon dancing. At thirty-five, say two learned judges of the Court of Special Sessions, at Jamaica, L. I., a man should cease to dance. This empirical pronouncement was made on the hearing of a charge against a man of thirty-five, lodged by his wife, that he neglected her at home, while he sought the delights of the dance halls. The chief justice of the court, however, who is over thirty-five, disagrees with his associates, handing down a dissenting opinion to the effect that a man should cease to dance only when his joints lose their flexibility, and when dancing fails to add to the pleasure of his life and to the gayety of nations. This is sound doctrine, and will be gratefully received by the white-haired devotees of the terpsichorean art. That age should not, of itself, exclude one from the dancing floor is a proposition that finds strong support in ancient as well as modern times. Socrates, for example, learned to dance when he was past sixty. And no facetious reference is here intended to the merry dance that the shrewish Xanthippe was wont to lead him. A modern instance showing that age does not always wither is the case of the aged couple at South Norwalk, Conn., who in celebrating recently their golden wedding participated enthusiastically in dancing the fox trot. *Verbum sat.* Judges should hesitate before laying down a rule of limitation in this matter that is bound to be upset in the court of public opinion.

Why the Pistol?

IT has been well said that organized society owes to its members the duty of making it as easy as possible for them to do right and as difficult as possible for them to do wrong. This principle can of course be easily misapplied to justify all manner of paternalistic measures that would unwarrantably encroach upon the personal liberty of the individual citizen. Many will doubtless place in that category the proposal that is here and now made; videlicet: that the private manufacture and sale of small firearms be absolutely prohibited. This proposal is not so radical and revolutionary as it may appear at first blush. We already have statutes forbidding the carrying of concealed weapons. These statutes, it hardly need be said, have not proved effectual to accomplish the end sought. Nor, it is believed, will there ever be an approximation to that end except through a complete ban upon the use of the pistol for other than police purposes. The proposal has a certain timeliness in view of the recent operations of the gunmen that have been exploited in the public prints. It would have little claim to serious consideration, however, if the reason for it were to be found only in these episodic incidents, flagrant though they be. The daily recurring homicides, suicides, and tragic accidents, of which the pistol is the convenient instrument, speak more trumpet-tongued against the longer sufferance of that diabolic piece of mechanism in a civilized society. What beneficent social purpose does the pistol serve that atones for the havoc wrought by it? It is a false notion of security that keeps it in the home. The housebreaker does not fear it, but its presence there does multiply the number of domestic tragedies. Unfortunately there has been thrown about the pistol a certain glamour that has blinded us to its real and essential ugliness. It is romantically exploited in the theater, where a certain amount of gun-play is thought to be necessary to stirring and effective melodrama. Similarly the fiction-writer has found the revolver an unfailing resource in the construction of his thrilling climaxes. In these and other ways we have been made so familiar with the pistol that we have become indifferent to its deadly significance, and, to a degree, our sense of the sacredness of life has been blunted. The pistol spells death, and it is high time that we realized that fact and placed an effectual ban upon its distribution and use. We are continually devising new methods to restrict the distribution of poisons and narcotic drugs, but we permit the barter and sale of the more deadly revolver to go on unrestrained. In all shapes, sizes and patterns these death-dealing devices gleam temptingly in the showcases of the gunsmith, and every pawnbroker's window is filled with them. They tempt to crime; they make crime easy. As a police measure, therefore, the prohibitive hand of the law may well be placed upon them. We confess that we do not like the word prohibition. But pistol laws now on the statute books are flagrantly inadequate, and a drastic prohibitive law such as has been suggested seems to be the only thing that will meet the situation.

Disclosure of Confidential Communications by Attorney.

THE question as to whether an attorney, in aid of public justice, should reveal the confidential communications of his client, has arisen in acute form at

Atlanta, Ga., in connection with the Leo M. Frank murder case. The attorney for the negro Conley has made public announcement that as a result of months of investigation and study of the case while Conley's counsel, following talks with Conley, he has come to the conclusion that Conley is the murderer, and that Frank, who is now under sentence of death for the crime, is entirely innocent. In thus removing the seal of silence which the ethics of his profession placed upon his lips has the attorney done right or wrong? If we fix our attention solely upon the concrete case at Atlanta, it may not be difficult to excuse the attorney. But looking at the question abstractly and as a proposition in legal ethics, no possible exigency, it would seem, can justify a lawyer in disclosing the confidential communications made to him by his client. The proposition seems simple and elementary. Where a person accused of crime consults a lawyer, and the relation of attorney and client is established, the attorney, for the time being, becomes the *alter ego* of the client. The communications made to the attorney do not belong to him but to his client, and are held in trust for the purposes of the client's defense. To disclose them is a flagrant breach of trust that approaches, if indeed it does not parallel, the disclosure of the secrets of the confessional. There are some rules of human conduct that admit of no exceptions. One of these is the inviolability of professional communications. This the law recognizes in foreclosing inquiry into the confidential communications between physician and patient, priest and penitent, attorney and client. And as the law makes no exceptions in this regard the lawyer should make none, no matter how urgent may be the circumstances of a particular case. The rigid enforcement of this rule may operate occasionally to the exclusion of truth. But truth, as Lord Justice Knight Bruce once said when discussing this subject, may be purchased too dearly. "Truth," said the Lord Justice, "like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."

Garnishment of Attorney's Contingent Fee.

IN the recent case of *Modlin* v. *Smith,* (Ga. App.) 79 S. E. 82, it is held that a "contingent fee" of an attorney, which is a proportionate part of a judgment recovered by him for his client, cannot be impounded and subjected to an indebtedness of the attorney by garnishing the judgment debtor. The debtor of the client, the court holds, does not become the debtor of the client's attorney by virtue of the fact that under the terms of his employment the attorney will be entitled to retain a stipulated portion of the recovery as his fee when or after the fund as a whole has been collected. "Conceding," says the court, "that there was a joint ownership by Mrs. Randolph and Smith, as client and attorney, in the fund recovered against the railway company, we do not think that garnishment would be the proper remedy to reach the interest of Smith as a joint owner of this money. . . . A garnishing creditor stands in no better position as against the garnishee than the debtor himself does. . . . So while Smith, as an attorney at law, might collect for his client the amount of the judgment against the Seaboard Air Line Railway, Smith as an individual—not an attorney at law—could not, by the judgment in favor of Mrs. Randolph, enforce the payment of his interest in that judgment, no matter what his interest might be. Conceding the utmost contention of counsel for the plaintiff in error, to wit, that Smith had a joint undivided interest amounting to half the debt due by the railway company, the lower court rightly decided that this interest could not be reached by garnishment. A debt due jointly to the defendant and another cannot be reached by garnishment in an action against the main defendant." Citing *Badger Lumber Co.* v. *Stern,* 123 Wis. 618, 101 N. W. 1093, 3 Ann. Cas. 802, and note. But, aside from this view, the judgment of the lower court is sustained on the ground that an attorney at law, where his fee as attorney for the plaintiff is payable by special contract out of the proceeds of the suit, has merely an inchoate lien. The attorney's lien is inchoate as soon as the action is commenced. Before it can be perfected or established it is essential to show the right of the plaintiff to recover. Even after judgment, the court says, the attorney who recovers the judgment has only a lien. And while this lien cannot be disregarded by the debtor who has notice of it, either before or after judgment, it is, after all, but a lien.

It will be gratifying to a considerable number of lawyers to have this judicial assurance that the weapon of garnishment which they have used so freely is not to be turned against themselves, and in a way in which it could be used with deadly effect. The fervid appeals of the personal injury lawyer in behalf of his "unfortunate client" would, we imagine, suffer some abatement if he were harrowed by the thought that hungry and voracious creditors were lurking outside the bar ready to pounce upon any verdict that he might wring from a sympathetic jury. And it may be as well, perhaps, for the client that his lawyer's efforts in his behalf should not be wholly disinterested and impersonal.

Presidential Control of Legislation through Patronage.

FORMER United States Senator Jonathan Bourne, Jr., of Oregon, in a statement given to the newspaper press discusses the pending controversy between the President and the Senate over patronage, and points out the dangers in a situation which gives dominance to the executive over Congress through his control of patronage. "When the framers of the Constitution gave the President power to appoint 'by and with the advice and consent of the Senate,'" says Senator Bourne, "they intended that no man should hold public office in the appointive classes, except for temporary vacancies during congressional recess, unless there be mutual agreement between the President and the Senate. The members of the constitutional convention could not foresee the vast expansion of the territory of the United States and the enlargement of the scope of its activities. They had not the remotest conception of the number of persons who ultimately would be employed in the civil service of the nation, now numbering over 470,000. They assumed that the President and the Senate could make personal inquiry and form personal judgment upon the qualifications of prospective appointees. But conditions have undergone a change they

could not foresee. To-day over 10,000 appointments are made by the President 'by and with the advice and consent of the Senate.' Over a thousand appointments are made by the President without confirmation by the Senate. There may be a dozen candidates for each position. It is absurd to imagine that any President can intelligently select the most desirable men for over 11,000 offices out of probably a hundred thousand applicants. If he gave his entire time to the matter, he could probably not intelligently fill 500 of these positions. Neither the President, nor the Senate as a body, can pass intelligently upon the qualifications of candidates for all appointive positions. The result has been that the President acts upon the recommendations of his political friends and legislative supporters, while the Senate usually acts upon the recommendation of the members from the state in which the appointee is to serve, if one or both of the members from such state be of the majority party. Hence, presidents usually favor senators and congressmen who support their policies, and reject the advice of those who do not. Patronage, therefore, has become a means by which the executive rewards those who agree with him on legislation, and punishes those who differ and have courage to exercise the inherent right and sworn duty of independent thought and action. Patronage has almost destroyed Congress as a co-ordinate branch of government and made it largely subservient to the White House. Important legislation is now planned and written in the executive branch of government and forced through Congress partly by the aid of patronage. Such a procedure is a menace to popular and representative government. It is the beginning of dictatorship."

The remedy Senator Bourne proposes for the condition that he deplores is the adoption of a constitutional amendment divesting the President of his power to nominate postmasters, collectors of customs and internal revenue appraisers, registers and receivers of land offices, district attorneys and United States marshals, and providing that they shall be elected by the people in their several jurisdictions. Thus only, he says, can we destroy the evil power of patronage, free Congress from subserviency to the White House, and make Congress a coordinate branch of government in the sense in which it was intended to be and should be. "Congress," says the Senator, "consisting of 531 members, can far more intelligently and unselfishly legislate for one hundred million people than can any president. The sole power of a president should be administration, not legislation—suggestion, not coercion—a veto resubmission to Congress, not the executive barter and sale of patronage for the initiation or defeat of legislation."

Senator Bourne is undoubtedly qualified to speak concerning legislative conditions at Washington, and no one will be inclined to question the accuracy of any statement he makes with reference to such conditions. Many, however, will not agree with him as to the feasibility or advisability of the proposed remedy for the evil that he points out. Making the federal offices that he mentions elective instead of appointive might, indeed, lessen the leverage that the White House has upon Congress in the matter of legislation, but it would be likely to bring other and perhaps greater evils in its train. The duties of most of these federal offices—the post office particularly—are largely administrative, and experience has shown that efficiency in the performance of such duties is more likely to be secured through an appointive than through an elective incumbency. The remedy for the evil that Senator Bourne deplores may lie in another direction. In reading his statement one can hardly escape the thought that if the President controls legislation in the manner and through the means stated it is because senators and representatives are subject to control by reason of their own appetite for the loaves and fishes of executive patronage. May not the evil conditions which are pointed out be better and more effectually remedied by a recrudescence in Congress of the old spirit of disinterested independence than by any extraneous change in our governmental machinery?

The Thaw Case in the Supreme Court.

HARRY K. THAW had a short shrift in the Supreme Court of the United States. In a brief opinion by Justice Holmes, which was concurred in by the other members of the court, it was held that Thaw should be turned over at once to the New York authorities, upon the extradition granted by the governor of New Hampshire, to answer the indictment charging conspiracy to escape from Matteawan asylum for the criminal insane. Justice Holmes first overruled the contention that it was not a crime for a man confined in an insane asylum to walk out if he could, and, therefore, a conspiracy to do so was not a crime. "We do not regard it as open to debate that the withdrawal by connivance of a man from an insane asylum, to which he had been committed, as Thaw was, did tend to obstruct the due administration of the law. At least the New York courts may so decide. Therefore the indictment charges a crime. If there is any remote defect in the earlier proceedings by which Thaw was committed, which we are far from intimating, this is not the time and place for that question to be tried."

Justice Holmes said the most serious argument for Thaw was that if he were insane when he contrived his escape, he could not be guilty of crime; while, if he were not insane he was entitled to be discharged, and that his confinement and other facts in the record required the Supreme Court to assume that he was insane. "But this is not Thaw's trial," commented the justice upon this line of argument. "In extradition proceedings even when, as here, a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the acts or the law of the matter to be tried. The constitution says nothing about habeas corpus in this connection, but peremptorily requires that, upon proper demand, the person charged shall be delivered up to be removed to the state having jurisdiction of the crime. There is no discretion allowed; no inquiry into motives. The technical sufficiency of the indictment is not open. And, even if it be true that the argument stated offers another question, it is a question as to the law of New York which the New York courts must decide." Continuing, the opinion says:

"The statute that declares an act done by a lunatic not a crime adds that a person is not excused from criminal liability, except upon proof that at the time 'he was laboring under such defect of reason as: 1, not to know the nature and quality of the act he was doing; or, 2, not to know that the act was wrong.'

"The inmates of lunatic asylums are largely governed, it has been remarked, by appeal to the same motives that govern

other men, and it well might be that a man who was insane and dangerous, nevertheless in many directions understood the nature and quality of his acts as well, and was as open to be affected by the motives of the criminal law, as anybody else. How far such considerations shall be taken into account it is for the New York courts to decide, as it is for a New York jury to determine whether at the moment of the conspiracy Thaw was insane in such sense as they may be instructed would make the fact a defense.

"When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what the governor of New York alleges to be a crime in that state, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the constitution provides for its taking place."

If Thaw on his return to New York is prosecuted on the conspiracy indictment it will doubtless be on the theory suggested in Justice Holmes' opinion that while too insane and dangerous to be at large he was at the time of the conspiracy sufficiently sane to understand the nature and quality of his acts. A prosecution under such circumstances is not without precedent. In *People* v. *Willard,* 150 Cal. 543, 89 Pac. 124, a trial for murder, where the defense was insanity, it appeared that the defendant had been twice, prior to the day of the homicide, committed to a state hospital for the insane on account of alcoholism, and, after a brief detention, had been discharged therefrom. He was a third time examined and ordered committed to the asylum on the day of the homicide, at the instance of the deceased, the sheriff of the county, against the defendant's protest that he was not insane and ought not to be sent there. Upon the trial for the homicide the jury returned a verdict of murder in the first degree. In affirming the judgment of death which was pronounced thereon the Supreme Court of California said that the several commitments of the defendant to the insane asylum did not prove that he was insane to such an extent that the law would exempt him from responsibility for his criminal acts. "There are many kinds and degrees of insanity," said the court, "and it is not every kind or degree which will relieve a person from such responsibility, and the degree of mental impairment which would authorize his confinement in an asylum for the insane may be entirely different from the degree of mental derangement which will relieve him from responsibility for his criminal acts. A person may be partially insane, or be insane upon one or several subjects, and for that reason be a proper person for confinement in a state insane asylum to be cared for and treated for his mental disorder, and yet at the same time such person may be perfectly sane upon all other subjects and entirely responsible under the law for a criminal act committed by him."

It has been suggested that the New York state authorities, when they regain possession of Thaw, may dismiss the conspiracy indictment against him and hand him over to the superintendent of Matteawan. In that event it is not unlikely that Thaw will sue out a writ of habeas corpus to enforce his right to a trial upon the indictment which caused his extradition. For such a course of procedure there is also a California precedent. See *In re Buchanan,* 129 Cal. 330, 61 Pac. 1120. In any event we shall have the Thaw case with us for some time yet to divert us with the moves and countermoves of ingenious attorneys and the learned dissertations of the courts. And when all this is over, some future Charles Reade, in a more lurid "Hard Cash," may exploit in fiction the prolonged efforts of a noted prisoner to escape the madhouse.

EFFICIENCY IN THE ADMINISTRATION OF JUSTICE.

A COMMITTEE consisting of Charles W. Eliot, Moorfield Storey, Louis D. Brandeis, Adolph J. Rodenbeck and Roscoe Pound has recently prepared and submitted a preliminary report for the National Economic League upon the subject of Efficiency in the Administration of Justice. The material utilized in this report has been: First, a collection of newspaper clippings from all parts of the country begun in 1907 and continued to the present; second, a card catalogue of decisions from every part of the country in which questions of practice or procedure were involved which seemed to indicate defects or possibilities of improvement; third, a collection of books and articles in periodicals both legal and lay, dealing with every phase of judicial administration. This material was put at the disposition of the committee by Mr. Pound. No attempt, the report states, has been made to discuss any proposition in detail. The purpose has been instead to state what seemed to be the principal causes of inefficiency in the administration of justice as indicated by the materials above referred to.

Inefficiency in the administration of justice may include two ideas, says the committee; first, inadequacy of the legal and judicial system to meet the purposes for which public administration of justice is instituted; second, inadequacy of the legal and judicial system to achieve all which the public expects of it. With respect to the latter the committee says: "We must recognize that intrinsic difficulties involved in the administration of justice according to law have always operated and are likely always to operate to bring about a certain amount of dissatisfaction with the public administration of justice. The advantages involved in law are purchased at the expense of certain disadvantages. Chief among these is the necessarily mechanical operation of legal rules which is one of the penalties of uniformity. This obstacle to the administration of justice according to law may be minimized but may not be obviated. As laws are general rules, the process of making them involves elimination of elements of particular controversies which are special to those controversies. In eliminating immaterial factors to reach a general rule in view of the infinite variety of controversies and the almost imperceptible differences of degree in their approximation to recognized types it is not possible entirely to avoid the elimination of factors which will be more or less material in some particular controversy. To take account of all these variations an over-wide discretion in the magistrate would be required. On the other hand, if exceptions and qualifications and provisos are appended to legal rules to any great extent the system of law becomes cumbrous and unworkable. A compromise must be made; a middle course must be found between over-wide discretion and over-minute law making. Necessarily, therefore, legal standards are more or less artificial, and a certain amount of divergence between legal and judicial standards on the

one hand and the ethical standards of each individual must be looked for. Again, as law formulates settled ethical ideas it cannot in periods of transition accord with the more advanced conceptions of the moment. Formulations of public opinion cannot become effective as laws until public opinion has become fixed and settled, and cannot change until a change of public opinion has become reasonably complete. In a time when groups and classes and interests are so diversified that conflicting ideas of justice obtain in the community it is impossible that everyone be satisfied with the public administration of justice. Moreover the layman is apt to assume that the administration of justice is an easy task to which anyone is competent. This feeling that special knowledge and special preparation are not necessary to enable one to pass upon the intricate controversies of a modern community contributes to the unsatisfactory administration of justice in many parts of the United States. Rules of law sum up the experience of many judges with many cases and enable the magistrate to apply that experience. One who has not had the proper training is seldom more competent to construct or apply such a formula than he is to construct or apply the formulas which enable engineers to make use of the experience of their predecessors. The public is more interested in maintaining the highest scientific standard in the administration of justice than it always realizes. The daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of legal science will be able to meet that criticism, does more than any other agency for the everyday efficiency of courts of justice. Finally law involves restraint and regulation, and necessary and salutary as such restraint and regulation are, individuals are never reconciled to it entirely. This is especially true when a feeling prevails that each individual as an organ of the sovereign democracy may judge how far he shall conform his action at the crisis of action to the law which he has helped to make."

Turning to the matter immediately in hand, namely, inadequacy of the legal and judicial system to achieve the purposes for which law and courts exist, the report of the committee takes up the subject under three heads: 1, Causes of unsatisfactory law-making by the courts; 2, Causes of inefficiency in the disposition of litigated causes; 3, Causes of inefficiency in enforcement of law. Law-making through the agency of the courts falls short of what it should be, the report states, through certain general causes operating over the whole country and also through local causes peculiar to particular sections of the country. The general causes appear to be three. "First, the demands of industrial and urban communities raise problems which the existing legal system, fashioned to meet the demands of a pioneer and agricultural community of the first half of the nineteenth century, is not well prepared to meet. The pressure of industrial accidents, a problem unknown to the formative period of our law, the pressure of social legislation which requires more speedy and sure enforcement than the legislation of the past, may be instanced. Second, the shifting of ideas the world over as to the nature of justice and the end of the law is putting a heavy pressure upon the administration of justice in all parts of the world and only the gradual working out and fixing of the new conception can relieve the pressure. Third, the great increase of legislation involved in the expansion of commerce and industry and the rapid growth of population has crowded the calendars of our courts to such an extent as to preclude the thoroughness in discussion by counsel and the deliberation in study by the court which is required in a constructive period. For instance, where a century ago a volume of the reports of the Supreme Court of the United States covered a period of fourteen months, during which time eighty-four causes were decided, a single volume of the reports of that court covers the single day of June 16, 1913, in which decisions were rendered in sixty cases. The highest type of judicial law-making may not reasonably be expected under such circumstances."

The causes of more restricted operation, and which the committee denominates local causes, are, first, the tenure, mode of choice and personnel of the bench; second, the education and organization of the bar; and, third, a bad state of legislative technique. Taking up the first of these the report makes a strong plea for an appointive judiciary. It says: "The best of which judicial law-making is capable may be expected only from the best type of court before which the best type of lawyer practices. So long as the public insists in so many of our jurisdictions upon conditions of tenure and modes of selection which preclude the type of lawyer best fitted to do such work from going upon the bench, and prevent the influence of the bar from being felt as it should be in the selection of judges, it is unreasonable to look for improvement of the law through judicial empiricism or for constructive law-making through decisions which may be compared with the classical achievements of the American bench in the constructive period prior to 1850. In what may be styled the classical period of American law the bench was for a greater portion of the time appointive or, if elective, elected by the legislature and tenure was assured for life. Even after the movement for an elective judiciary gained strength about 1850, the traditions of the older order maintained a high standard for some time. Since the Civil War, except in New England, the bench has been elective with few exceptions and for the most part for relatively short terms. The constructive work in American law, the adaptation of English case law and English statutes to the needs of a new country and the shaping of them into an American common law, was done by appointed judges, while most of the technicality of procedure, mechanical jurisprudence and narrow adherence to eighteenth-century absolute ideas of which the public now complains is the work of elected judges. The illiberal decisions of the last quarter of the nineteenth century to which objection is made to-day were almost wholly the work of popularly elected judges with short tenure. Moreover, where to-day we have appointive courts these courts in conservative communities have been liberal in questions of constitutional law where elective judges, holding for short terms, have been strict and reactionary. Under our system of making law through judicial empiricism almost everything turns on the strength, capacity and learning of the judge. We require much more of a judge than popularity or honest mediocrity or ignorant zeal for the public welfare can bring about. If our system is to work well, experts must be chosen, and in consequence the mode of choice must be one which will be governed by expert knowledge of the qualifications of those who are chosen. Experience has shown that in states where the bar have the most influence in the choice of judges the bench achieves the best results. That American law grew so rapidly and

was fashioned so well up to the Civil War and stood still so steadfastly for a time thereafter was by no means wholly due to causes that made for rigidity of law throughout the world. It was due in large part to a change in the character of the bench as a whole in our state courts. That this change is closely connected with the change in the mode of choice and tenure of judges which became general after 1850 is demonstrable. For no such change took place in those few jurisdictions in which the courts remained appointive. Because of the mode of choice and of secure tenure the judicial office continued to attract the leaders of the profession. It should be noted also that while judges of the first order have sometimes succeeded in holding their places by popular election, quite as often they have failed to do so. The unfortunate situation in which the judge sits as a mere umpire in a game between counsel grew up under an elective bench and is to be found chiefly, if not wholly, where the judiciary is elected for short terms. This is true also to a large extent of the well-known abuse which often requires at least as long a time for the selection of a jury as for the trial of a cause. This condition for instance is quite unknown in the federal courts or under the appointed judiciary in Massachusetts and New Jersey. Lack of control over the bar on the part of judges, who cannot insist upon expedition without imperiling their positions, is not the least cause of unnecessary continuances and postponements and of the wranglings of counsel and the unfortunate treatment of witnesses which have cast discredit upon American trials. Machinery is not the important thing. What is important is that experts be chosen. Our law is suffering to-day from the unhappy experiment of two generations ago whereby logical carrying out of an abstract political theory was preferred to expertness and qualification for their office on the part of officials in whom expertness is of the highest import to the commonwealth. A similar experiment with respect to administrative offices ultimately taught us the value of an expert civil service with secure tenure."

The committee likewise makes a plea for a higher standard for admission to the bar. "So long," says the report, "as the public in so many of our jurisdictions insists upon treating the practice of the law as a mode of earning a livelihood which should be open to everyone, and refuses to exact those requirements of preliminary education and thorough professional training which are required not merely to make the lawyer an efficient agent in the public administration of justice through thorough presentation of causes, but also to make him an effective public servant through initiation and promotion of improvements in legal institutions and doctrine, attempts at reform addressed only to judicial machinery will be quite futile."

Not the least cause of inefficiency in the exercise of the law-finding or law-making function of our courts, says the committee, is the bad state of legislative technique which exists in most American jurisdictions. "Legislative reference bureaus are remedying this evil to some extent, and no doubt these bureaus and the study of the science of legislation which is now becoming general will gradually improve our enacted law. But as the matter stands, in many of the states the law has an enormous mass of legislation imposed upon it annually which is worked out on no common system, is coördinated neither with the existing law nor with its several parts, and is often inconsistent with itself on fundamental points. This is true particularly with respect to legislation in matters of criminal law. Moralists, sociologists and criminologists are by no means agreed as to the basis of punitive justice, and satisfaction of a public desire for vengeance is regarded by many as a legitimate as well as practically necessary end to penal treatment of offenders, while others regard the retributive theory as the bane of criminal law. This disagreement is reflected in legislation. Not only do statutes enacted at different times proceed upon different theories, but adherents of one theory will procure one measure and those of a different theory another from the same legislators, who have no theory of their own. The courts are required to make a workable system out of this mass of legislation. But it must be clear that the task is difficult and must involve much experimenting that impairs the effectiveness of the legal system. Standing parliamentary counsel, after the English and Canadian model, and more general study of the principles and practice of legislation seem to be the only immediate remedies available."

With respect to the application of the law to litigated cases, the committee once more divides the causes of inefficiency into general causes and local causes. Causes of general operation are: (1) The defective organization of our courts; (2) the want of proper organization of the administrative and clerical side of our tribunals; (3) our procedure; (4) the concurrent jurisdiction of state and federal courts; and (5) the strong tendency of our law to local particularism. Causes of local operation are: (1) Special problems in metropolitan cities; (2) want of adequate provision for disposition of petty causes; and (3) survival of legal institutions and procedural methods intended to obstruct collection of debts in pioneer communities. Upon the subject of the defective organization of our courts the report says, *inter alia:* "We waste judicial power in the United States in three ways. One is by multiplication of tribunals with hard and fast personnel and hard and fast jurisdiction. Another is by the vicious practice of rapid rotation which prevails in so many jurisdictions, whereby no one judge acquires a thorough experience of any one class of business. Thus each spends valuable public time in learning the art of handling special classes of judicial work only to pass on to some other special class where he must learn a wholly new art. When the specialist would act with assurance and decision, one who comes fresh to a special field of judicial administration must needs proceed painfully and cautiously. Still another form of waste is the treatment of controversies piecemeal, part in one court or proceeding and part in another, with no power to refer all the proceedings to one tribunal. Thus conflicts often arise which set court against court, although both are set up to the same end. And if conflict does not ensue, as, for instance where the jurisdiction of equity to give complete relief may be invoked, the attempt to administer justice in detached fragments, even if more or less successful, involves delay, expense and waste of judicial time in hearing over again the common elements in the controversy, already heard by others, but necessary to an understanding of each particular phase. These defects are more acute in some states than in others. But in one form or another they may be found everywhere. Effective administration of justice in the urban communities of to-day requires a unification of the judicial

system whereby the whole judicial power of the state shall be vested in one organization, of which all tribunals shall be branches or departments or divisions. In organizing the personnel of this unified judicial department, the cardinal idea should be to permit the entire judicial force of the commonwealth to be employed in the most effective manner possible upon the whole judicial business of the commonwealth, aiming to have specialist judges rather than specialized courts."

Ten respects are pointed out in which procedure generally, or in a very large number of states, contributes to inefficiency in the administration of justice. a. Too much legislation as to details of procedure. b. Treatment of rules of practice as giving procedural rights to parties which they may vindicate although their substantive rights are not affected. c. Record-worship. d. Preservation of sharp formal issues. e. Throwing of causes out of court when a transfer or change of procedural form would save proceedings already had. f. Piecemeal disposition of controversies. g. Too many trials and retrials. h. Too little power of guidance of the jury by the court. i. Too much use of the jury as a tribunal for ordinary civil causes. j. Too much appellate procedure.

The causes of inefficiency in enforcement as distinguished from application of the law are also classified in the committee's report as general causes and local causes. Five general causes are pointed out as noteworthy: (i) Want of proper coördination between law and administration; (ii) the break-down of the common-law polity of individual initiative in enforcement; (iii) the heavy burden imposed upon law in that we call on it to do what was formerly achieved through the church and home, and so demand that it do more than can be done through legal machinery; (iv) divergence of class interests in a community no longer homogeneous, often leading to legislation in the interest of a class, enforcement whereof is opposed or resisted by another class, with the community at large, as like as not, quite indifferent; and (v) a failure of popular interest in justice, so that, just as our machinery of primaries and elections does not always produce the best results of which it is capable, because citizens neglect to go to the polls, our judicial machinery does not always work as well as it might because they shirk or evade jury service and do not insist actively upon maintenance of the right at whatever cost. Two causes of inefficiency in enforcement of law are mentioned as of local operation in many of our jurisdictions: "(i) One is diversity of interests in different parts of the same state which lead to laws imposed by one section on another and to resistance of their enforcement by the latter. (ii) A second is the close contact of criminal law and its enforcement with politics."

Concluding its interesting and valuable report the committee says: "The main points to which we should address ourselves appear to be: (1) Proper training of the legal profession; (2) giving the bar greater influence in the selection of judges so as to insure expert qualifications in those who are to perform an expert's functions; (3) unification of the judicial system and more effective and responsible control of judicial and administrative business; (4) giving power to the courts to make rules of procedure and thus giving the courts power to do what we require of them; (5) improvement of legislative law-making both in substance and in technique; and (6) thorough study of the new problems which an industrial and urban society has raised and of the means of meeting them with the jural materials at hand."

THE RESULTS OF A COMPARATIVE STUDY OF THE EXAMINATION QUESTIONS FRAMED BY STATE BOARDS OF BAR EXAMINERS.*

"How must a partnership exist?"

"What is the origin of the maxim, *Consensus non concubitus facit matrimonium?*"

"What are the great private economic relations of life and how do they arise?"

"Name the twelve maxims of Equity, using either Latin or English words (Latin preferred) and in giving these maxims, state them just as near as you can as stated by the text books on Equity."

These questions were not written by a jesting Rabelais for a juridical comic supplement, but were asked at an official state-conducted examination for admission to the bar in June, 1914. Many a bar examination paper truly affords glimpses of the possibilities of the grotesque not outdone by Robert Browning's "Caliban upon Setebos."

You ask: Can such things be? Have Langdell and Ames and Keener lived and taught and written in vain? Are not true shrines of legal education widely and bountifully maintained?

And the answer is: A shabby trick of memory such as the recollection of twelve equitable maxims, "Latin preferred," is a far more precious endowment to the candidate, for bar examination purposes in many states, than the ability to think clearly, analyze accurately and discriminate properly along approved legal lines. Of what conceivable value is sound training when tested by the memorization of wise saws, definitions, and Latin maxims?

What kind of nonsense, what order of foolishness is it, that impels us lawyers to agree that the vital necessity for the law student is his acquisition of the power of logical analysis and thoughtful discrimination in handling legal propositions, and at the same time leads us to furnish many a bar examination paper calculated to test little more than his memory, and perhaps his sense of humor?

Impatience with the shortcomings of others, it has been said, is the measure of forgetfulness of our own. But there are times when impatience itself becomes a virtue.

In the comparative study of recent question papers, a few of the points to be borne especially in mind are: (1) How much of the hypothetical as compared with the definitional question? (2) How much local variation in substantive common law? (3) How much statutory law? (4) How much local procedure? (5) How much jurisprudence, that is, "broad view of the law"? (6) How much business knowledge? Also, how much weight is laid upon the written test? Is it supposed to provide a comprehensive adequate test of the applicant's fitness, or does it provide merely incidental evidence thereof? Of course, many other topics suggest themselves, but only the most vital can be considered herein.

In jumping at conclusions, you rarely land upon your feet. Despite the obvious truth of this, certain simple facts about to be set forth, sometimes in juxtaposition to other facts, lead to obvious and readily reached conclusions.

*Paper read before the American Bar Association, Section of Legal Education, October 19, 1914.

"Write your answers plainly on one side of the paper only and guard your spelling and punctuation." This admonitory "note" appears at the beginning of each of the four subdivisions of a June, 1914, bar examination paper. The thirty-first question contained two errors in spelling in one line. The thirty-ninth question read, "What is meant by the term corpus delicto" (*sic*). And these errors by no means stood alone.

Doubtless you have landed upon your feet in jumping at a conclusion with regard to this sort of carelessness. Doubtless, so did the young applicants.

The ninth question on the subject of Real Property on another June, 1914, paper asked the candidate to "state the rule in Shelles' (*sic*) case." On another paper a question read: "What is easement and how are they (*sic*) acquired?" But enough of this.

On one recent examination paper, the twenty-third and thirty-third questions respectively read:

"What maxim of equity does Bispham say lies at the foundation of many of the important doctrines of equity?"
"Into what four classes has Lord Hardwicke divided fraud, as set out in Bispham?"

A candidate might be familiar with the classic works on Equity Jurisprudence by Story and Pomeroy, but Bispham alone—a far inferior work—provided the "Open Sesame" to his success. A candidate might be familiar with Ames' or Keener's excellent selections of cases on Equity and might be able to apply his learning so as to work out the correct answer to the most intricate and complicated problem in specific performance or rescission, but of what avail was his training to him when he sought to answer these questions? Which was of more value to the candidate at that examination: a recollection of certain statements in Bispham's text, or possession of the capacity to reason convincingly and correctly along sound lines of legal scholarship? Is it jumping at a conclusion to assert that such questions as these afford, at best, only the weakest and most artificial variety of mental test? Does lack of knowledge of the elegantly worded generalities in Bispham stamp the candidate as unfit for practice?

Is not such a question as the following, asked at an examination held in Connecticut in May, 1914, far preferable:

"P holding a note on X upon a secret trust for M, wrongfully indorsed and delivered it after maturity to A who bought it in good faith. P subsequently collected the amount of the note of X the maker. Can A charge X upon the note? Reasons."

This question calls not only for a knowledge of equitable principles but for their logical application. The latter is what the lawyer daily is called upon to do. The client does not ask his counsellor to state twelve equitable maxims, "Latin preferred," or to tell him what maxim Bispham says lies at the foundation of many equitable doctrines, but rather to apply correctly for him the appropriate principle to the facts. It follows, does it not, that more is needed than a mere lip-service to Bispham? And is it not also incontestable that the neophyte may possess the true touchstone to the highest legal success, though, alas, unguided on his way by Bispham? And would you be jumping at a rash conclusion to say that such questions work a monstrous social, not to say individual, injustice?

We are always profoundly critical of the examination papers of somebody else. At the same time, far too many bar examinations contain an overdose of definitional and informational questions. Bar examiners properly insist that the community has a right to expect a lawyer to know something about what the law actually is. One question at an examination held recently in a Middle Western state called for a knowledge of the general nature of preferred stock in a corporation. It was astounding and lamentable to see how many candidates knew absolutely nothing about preferred stock. Can such students really be said to know the subject of corporations? The point is, it will not do to decry the informational side too much. It is not unreasonable for bar examiners to expect the possession of elementary knowledge. If any law school is emphasizing the acquisition of the legal mind at the expense of acquiring such information as any lawyer should possess, it is mistaking its function. "Training and knowledge, the means and the end of legal study, go hand in hand." On the other hand, the value of a lengthy string of questions calling for definitions and information and for little or nothing else, is gravely problematical. In one state, the ninth, tenth, eleventh and twelfth questions asked were:

"What are the essential elements of a negotiable instrument?"
"What is the doctrine of extralateral rights?"
"What is (*a*) land, (*b*) tenements, (*c*) hereditaments?"
"What do you understand by the term 'Domestic Relations'?"

The first four questions on the same paper were:

"Define evidence."
"Define Equity, and state its origin in English law, and the causes of its existence."
"Define a contract."
"Define a private corporation, and distinguish it from a co-partnership."

While questions with an informational object in view are not unwarranted, it is submitted that the form of such questions properly should call for the application of sound reasoning as well. The aim should be to emphasize logical thought moulded in grooves of legal scholarship, rather than mere poll-parroting by rule of thumb. That proper questions can be framed, the quiz papers not only of many law schools but of several bar examination boards, clearly show.

For instance, let us suppose we wish to ascertain what the candidate knows about the topic of fixtures. How shall we frame the question? Shall we ask him, as one state board did last June,

"What are fixtures?"

Shall we ask him as another state board did last June,

"What are the leading tests to be applied in determining whether or not personal property becomes a fixture?"

Or shall we ask him the following question framed last May in a third state:

"A lessee installs a motor and a machine in leased premises, the motor screwed to the wall and the machine set firmly in a concrete bed. After the lease expires and the tenant moves out of the premises he sends a truckman to remove the motor and the machine. The lessor refuses to allow the removal of the machine and motor. Has the lessee a remedy? Give reasons."

Which of these three questions shall we emulate? Shall we make it easy for ourselves and ask him to define fixtures, or to state the tests? Or shall we compel our candidate to exercise his gray matter as well as to ransack his memory, and give him a concrete state of facts, first to analyze, then to ponder over, and finally to solve, if he can, by the application of settled principles of the law of fixtures? True, it will be more difficult for us to frame the latter kind of question than for us to frame the former kind. But shall we be swayed by motives of ease rather than by motives of efficiency? Questions intelligently framed in proper form will make it well-nigh impossible for a candidate to attain success by the memorization of semi-under-

stood rules in popular black-letter texts, or of semi-understood saws and maxims in legal primers fit alone for a kindergarten.

How much emphasis should be placed upon local decisions and statutes? If a candidate has a thorough grasp on the basic principles of the common law and exhibits sound habits of legal thought, should he suffer simply because his mind is not crammed with local technicalities whether legislative or judge-made? This is not to say that localized knowledge is not of value. It assuredly is. And it is fair and reasonable to require familiarity with such fundamental local law as the requisites of a valid will or the provisions of the state statute of frauds. Unfortunately, many examination boards have so over-emphasized acquaintance with mere local variations and anomalies as to convert an otherwise not unreasonable requirement into an unjust mockery. One state, for example, asks these two questions:

"What are the methods of creating a trust pointed out by Chief Justice ——— in a leading case, and what is the name of the case?"

"What was the purpose of 13 Eliz., c. 5, and of 27 Eliz., c. 4, and have those statutes been enacted into the Code?"

So, an applicant ought not to be required to "Give twenty statutory provisions relative to corporations," as another state demanded last June.

One possible aid to the solution of this problem is afforded by the examination paper of a New England board which allots thirty minutes of time to the answer of five questions on the local "constitution and statutes." In any event, the test primarily should be one of thorough absorption of fundamental principles, and should not degenerate into a petty search for provincial heterodoxies.

It is interesting to note an increasing desire to test general business and financial knowledge in so far as concerned with the law. Thus, a question like the following, asked in Maryland a year ago, seems to square well with modern corporate developments:

"What is the nature of what is called an agreement of underwriting of corporate securities; what is the purpose sought to be obtained; and how is the underwriter paid?"

Is it not essential for the candidate to have his attention directed to such timely and practical matters, so that when he is asked about the nature of underwriting he will not be in the position of the college boy who wondered whether the Renaissance was something good to eat?

As to how the examination paper should be subdivided and the weight to be placed upon individual subjects, no two states are in harmony. One state, for instance, will require no knowledge of international law. Another will devote two full questions to this topic, while allotting to constitutional law only three questions and to torts the same number.

The questions asked concerning constitutional law are often startling. One late paper asked the candidate to—

"Name four men who signed the Declaration of Independence,"

and to

"Recite the Preamble to the Constitution of the United States."

Another state, famed for what it terms its progressivism, asked these two gems last June:

"What were the four great charters of English liberty?"

"When was the Declaration of Independence made, and what was declared by it?"

In other jurisdictions we find these:

"Define treason under the statute of 36 George III, ch. 7."

"In Constitutional history which first had origin and development, State Government or Federal Government?"

"Give three general rules for the construction of constitutional provisions."

"When and where was the last Constitutional Convention held in this state?"

These questions serve to convict their framers of an utter failure to understand the splendid opportunity afforded by problems in constitutional law to test prowess in reasoning and in nice discrimination. Instead of asking for four signers of the Declaration, or to tell when the last convention was held, or to imitate John Hancock's signature, it would seem a very simple matter, in this era of constant constitutional controversy, to frame questions like the following one, asked most opportunely in Rhode Island last March:

"The Federal Income Tax Law of 1913 contains certain provisions in regard to 'payment at the source' which require (1) every employer to withhold and deduct the tax from the salary of his employee and to make a return thereof and pay the tax to the Government; (2) every corporation to withhold and deduct the tax from interest upon its bonds and to make a return thereof and pay the tax to the Government; (3) every bank receiving coupons for collection to attach certificates to such coupons and to make a return to the Government. In the above cases additional expense is caused to the employer, the corporation and the bank by reason of the above requirements. What is your opinion in regard to the constitutionality of the above mentioned provisions of the Income Tax Law?"

It is said to-day that lawyers are unduly narrow. If that be so, all the more reason for requiring a broad liberal training as a *sine qua non* to admission. Whether the candidate has this training can be ascertained upon a bar examination with comparative ease. Questions testing knowledge of jurisprudence and of legal history and development are well calculated to "read between the lines." Of course, they should not be over-indulged in. Consider the potent possibilities of these two questions recently asked in Pennsylvania:

"Briefly discuss the origin, nature and use of the action of assumpsit at common law."

"When, and for what purpose was the statute of uses enacted; and what were the principal changes in the law of real property which resulted therefrom?"

In New Hampshire, last spring, the excellent first question on criminal law read:

"What was the common law theory of punishment and how far does it involve the ideas of (*a*) retribution, (*b*) protection of society, (*c*) reformation of the criminal?"

Though some bar examination boards call for the statement of twelve maxims of equity, "Latin preferred," it is equally true that some others frame admirable questions; some such have been quoted herein. And it is equally a fact, however sad, that the printed examination paper in equity of a state university law school shows that only last year it, too, requested its students to "Enumerate the twelve leading maxims of equity." However, the state university might be comforted perhaps by learning that last June a state board asked, "What are the *thirteen* maxims of equity?" No matter by whom asked, or when or where asked, such questions do not withstand the qualitative test, however they may respond to the quantitative.

The first hindrance in the way of improvement is found in the general attitude of indifference on the part of many members of the bar. They apparently share the sentiments of an Illinois lawyer, who in 1912, when the Bar Association of that state was debating the subject of higher standards, said:

"It was remarked a good many hundred years ago that 'much learning hath made thee mad.' I do not sympathize with some of these modern things. My mind goes back to Abraham Lincoln when he was a poor boy, and if you go into Judge Landis' court room you will see pictured the table tipped over and the

books on the floor and little Abe there reading the books. He was one of the greatest lawyers that ever walked the earth, and he never saw the inside of a law school, in that sense; some of the best lawyers we ever had never were in a high school. . . .

"Now, in my case, I never saw the inside of a high school. A poor boy, at thirteen, I closed up my books and went as a drummer boy to the army and finally got to be large enough to carry a gun, and I fought to keep the Union together. I read law in a telegraph office while I was a telegraph operator on the C. & N. W. and elsewhere, and old Ed. Dutch in Oregon bought me the books and gave me Blackstone, and he said, read it, but not like a novel; and I have sent whole chapters out of that Blackstone over the telegraph key while I was practising; and I passed an examination of the Supreme Court, and I passed 100 in the examination, and I never saw a high school. . . . Now give the boys a chance."

The theory of such lawyers seems to be: "Let them all leap over the bars; give all the boys a chance." This mistaken attitude on the part of many otherwise valuable members of the bar is directly responsible for much of the mischief. It is high time for the entire bar to realize that upon nothing do the competency and the dignity of the profession more directly depend than upon the standards of admission.

The second reason is found in the fact that most, if not indeed practically all, bar examiners are busy and well-known practitioners. The Supreme Courts seemingly wish such men as their law examiners, and such men, of course, are not able to devote more than a limited amount of time to their duties. Besides, they have ordinarily not kept pace with improvements and developments in legal education, their attention being necessarily devoted to other matters. One member, at least, of every state board of bar examiners should be a comparatively young man who can devote his entire time, if needed, to his duties. He should be thoroughly acquainted with modern legal education. Preferably, but not necessarily, he should have had some law-teaching experience. Let him be styled the clerk or registrar of the board. Let him be paid a decent compensation. The resultant good to the profession, to the courts and to the community would be immeasurable. Under the prevailing system, the examiners mean well and do the best they can, in most cases, but they are greatly hampered because of the very merits and virtues for which they were selected.

Better bar examination questions mean raised standards of admission to the bar. Raised standards of admission to the bar mean better lawyers. Better lawyers mean a better brand of social and individual justice. Better justice means a nearer approach to a millennium of sweetness and of light.

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A NEW SYSTEM OF COURTS.

THE American Judicature Society, of Chicago, is sending out a first or rough draft of a statewide judicature act intended to be enacted to supplant the system of courts and administration of justice now in vogue, with but slight variation, in every State of our Union.

The proposed new system contemplates the abrogation of every court below the supreme court of the State. The supreme court is to become a great central tribunal with subordinate branches and judges to be supervised and controlled by this central tribunal, in reality but a single court with several subordinate divisions.

This first or *rough* draft of this proposed new judicial system is a very *smooth* copy of the judicial system of China, now and for nearly 5000 years the native judicial system of that country. From a Chinese standpoint that is how new this new system is.

Considered as one of the fundamental principles of government in general, this system is as new as paternalism and monarchy.

The system of a central court with subordinate branches and judges belongs to that period when absolutism is confronted with too great a population and extent of territory to permit the autocrat to direct personally his entire autocracy or kingdom. Then he appoints a chief judge, or personal representative, formerly known as "the keeper of his conscience," variously called viceroy, chancellor, minister—frequently an ecclesiastic, as witness De Retz, Mazarin, Richelieu, and seldom or never a doctor of the law.

We thus see that this "new judicial system" belongs, and has always been present, with the early ages and stages of civilization. In that connection and sense only is it new.

If this propaganda for a "new judicial system" stood alone, perhaps it would require no comment; but it is only one of a very numerous class. At the present time and for several years last past, we have been deluged with schemes, urged as reforms and betterments, but in reality ulterior attempts upon our popular form of government—the short ballot which would give us bureaucracy, educational systems to restrict popular control of all matters, the extension of interstate regulations to the point of destroying all the powers and government of the States, and many others. The transfer of our police powers to the Nation means that we will be under the equivalent of a foreign dominion; and the adoption of the central court system means that we are going back to medieval Europe and present China for something "new."

Our own Revolution was fought, among other things, against the tyranny of a central court, the will of the British sovereign, when the judges took their "instructions" from the crown, then "the fountain of justice" in England, the central court.

Our government is founded in the independence of the judiciary, the greatest boast of free men. The "new judicial system" would make all subordinate judges mere "hired hands," and the "great chief" alone might be said to be independent, but his independence would be altogether like that of the British crown in former times, pure tyranny, and that is what unrestrained discretion has always been.

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THE MONROE DOCTRINE AND NEUTRALITY.

IN reply to a question addressed by the Earl of Ronaldshay to the Prime Minister, which was answered by Mr. Charles Roberts, the Under-Secretary of State for India, on behalf of the foreign office, it was stated that information in the possession of the government indicated that the governments of Colombia and Ecuador had in certain respects failed to observe an attitude of strict neutrality, and that their failure to do so was likely to be detrimental to the interests of this country. Mr. Roberts added that, representations to the Colombian government having failed in their object, His Majesty's Government decided to appeal, in conjunction with the French Government, to the good offices of the United States Government to use their influence to secure more correct observance of Colombian neu-

trality. An appeal for the exercise of the good offices of a power wholly disinterested in a controversy between states, with a view to an amicable settlement of differences, is not infrequently a course pursued as a last resort for the avoidance of a declaration of war. The appeal of Great Britain and France to the United States in reference to the failure of Colombia to observe strict neutrality in the war now raging is, we apprehend, of a character which differs from the generality of appeals in such cases. It seems to be made to the United States by virtue of its primacy or overlordship in the American continent, which is the development of the Monroe Doctrine as enunciated in the special message of the President to Congress on the 17th Dec., 1895, on the occasion of the intervention of the United States in the boundary controversy then pending between Great Britain and the Republic of Venezuela, which terminated, in accordance with the suggestion of the United States, in a submission of the dispute to arbitration. The Monroe Doctrine has, by the message of the President, and as a result of the communications between Great Britain and the United States in respect of the Venezuelan controversy, been restated in such a form as to warrant the contention that the United States, by virtue of its primacy or overlordship in the New World, has the right to act as final arbiter, and to carry out its decrees by force, if necessary, whenever a controversy is pending between a European power and an American state whose consequences may threaten an extension of the European system in the American continent. In order fully to develop that idea, the President maintained "that if the balance of power is justly a cause for jealous anxiety among the governments of the Old World and a subject for our absolute noninterference, none the less is the observance of the Monroe Doctrine of vital concern to our people and their Government." The position was thus clearly enunciated on behalf of the United States that the same supreme directing and arbitratory power which in the Old World is vested in the concert of Europe is in the New World vested in the Government of the United States acting alone, while Great Britain acknowledged as a matter of fact that such a primacy is vested in the United States by accepting the arbitration on which the Government of the United States insisted, although the interests of this country in the American continent are far greater than those of any other European power. It is, of course, true that the Monroe Doctrine is established for the purpose of preventing permanent occupation by European powers of the territories in the American continent not included in the European system; but every movement with a tendency, however remote, to such permanent occupation is the subject of the jealous scrutiny of the United States by virtue of its primacy in the New World, which is an essential element of the Monroe Doctrine in the natural and, indeed, necessary course of its development.—*Law Times.*

Cases of Interest.

CONSTITUTIONALITY OF INITIATIVE AND REFERENDUM LEGISLATION.—The Kansas Supreme Court held in the late case of State *v.* Board of Commissioners, (Kan.) 144 Pac. 241, that initiative and referendum provisions of a Kansas statute were not repugnant to that portion of the United States constitution which guaranteed to every state a republican form of government, as such a government was one constructed on the principle that the supreme power resided in the body of the people.

VIOLATION OF STATUTE REQUIRING FENDERS ON STREET CARS AS AFFECTING RAILROAD'S LIABILITY FOR DEATH OF CHILD STRUCK BY CAR.—The rule was laid down in Natalie *v.* Chicago, etc., R. Co., (Wis.) 149 N. W. 697, that the fact that a street railroad company operated a street car which was not equipped with a fender as required by statute did not make it liable for the death of a child due to being struck by the car, in the absence of a showing that the violation was the proximate cause of the child being killed. The court said: "Respondent's counsel argue that the jury found that this statute had not been complied with, and that the defendants were guilty of gross negligence on account of the violation of the statute, under the decision in Pinoza *v.* Northern Chair Co., 152 Wis. 473, 14 N. W. 84. It is there held that where the violation of a safety statute is made a criminal offense such violation should be classed with gross negligence, and that a person injured because of the failure to comply with the statute could recover notwithstanding the fact that he was guilty of contributory negligence. The material difference between the two statutes, if there is any, arises out of the fact that section 1728a, under which the Pinoza case was decided, provides a punishment by fine or imprisonment, while section 1636-58 provides for a fine only. Whether this distinction be important or not it is unnecessary to decide, because the Pinoza case does not reach the question here involved. In that case the jury found that the failure to comply with the statute was the proximate cause of the injury. Here the jury found that the failure to furnish a suitable pilot or fender was not a proximate cause of the injury. The element of proximate causation must exist in the case of gross negligence, as well as in ordinary negligence, in order to make a case for recovery."

"DOMESTIC ANIMAL" AS INCLUDING CAT.—In Thurston *v.* Carter, (Me.) 92 Atl. 295, which was an action of trespass brought for the recovery of damages for the killing of the foxhound of the plaintiff by the defendant, the latter in justification claimed that he shot and killed the plaintiff's dog while it was chasing and worrying a cat belonging to and upon the land of the defendant and in doing so was acting under a statute as follows: "Any person may lawfully kill a dog which . . . is found worrying, wounding, or killing any domestic animal, when said dog is outside of the inclosure or immediate care of its owner or keeper." The holding of the court was that the statute authorized the killing of the foxhound in view of the circumstances shown in evidence. The real question in dispute was whether a cat was a "domestic animal." This was answered by Bird, J., as follows: "The cat is defined as 'a domestic animal that catches mice.' Johnson's Dict. 'A well-known domesticated carnivorous mammal, kept to kill mice and rats and as a house pet.' Standard Dict. 'A carnivorous quadruped (felis domestica) which has long been kept by man in a domestic state, as a pet and for catching rats and mice; . . . (it) is not known in the wild state.' Webster's New Int. Dict. The time of its first domestication is lost in the mists of the dawn of history, but it is apparent that the cat was a domestic animal among the early Egyptians, by whom it came to be regarded as sacred, as evidenced by the device of Cambyses during his invasion of Egypt B.C. 525 or 527, which could scarcely have been feasible if the animal was then wild. From that day to this it has been a dweller in the homes of men. In no other animal has affection for home been more strongly developed, and in none when absent from home can the *animus revertendi* be more surely assumed to exist. 'But the common law has . . . adopted the test laid down by Puffendorf, by referring the question whether the animal be wild or tame to our knowledge of his habits, derived from fact and experience.' 2 Kent, § 349. It is clear, therefore, from the

popular meaning of the word 'domestic' and from our knowledge of its habits gained from fact and experience, that the cat is a domestic animal."

UNGUARDED POND NEAR HIGHWAY AS ATTRACTIVE NUISANCE.—In an action to recover damages for the death of the minor son of the plaintiff, the Washington Supreme Court held in the case of Emond *v.* Kimberly-Clark Co., (Wis.) 149 N. W. 760, that the complaint which showed that the son was drowned in an unguarded pond near a highway and on land belonging to the defendant, did not state a cause of action. The plaintiff's case rested on the proposition that the defendant was negligent in leaving the pond unguarded and that it constituted an attractive nuisance. This contention was overthrown. Vinje, J., said: "Generally speaking it is true, as stated in defendant's brief, that every drop of water, except that in the washbowl, is attractive to children; and it is also true that all bodies of water deep enough to drown a child, and situated within roving distance of children, present a danger from which an injury to some person or death may reasonably be anticipated. But it does not follow from such fact that a duty on the part of the owner to fence or guard springs therefrom. There are many useful, lawful structures and objects of which the same is true. One having a grove of trees, especially be they nut-bearing trees, may reasonably anticipate that a boy may climb one and be injured. Such occurrences are by no means rare. But would any one claim that he must fence or guard his trees, lest an injury to a child might result? The difference between an attractive lawful object and an attractive nuisance must not be overlooked. . . . The world cannot be made danger-proof—especially for children. To require all natural or artificial streams or ponds so located as to endanger the safety of children to be fenced or guarded would in the ordinary settled community practically include all streams and ponds, be they in public parks or upon private soil, for children are self-constituted licensees, if not trespassers, everywhere. And to construct a boy-proof fence at a reasonable cost would tax the inventive genius of an Edison. Heretofore it has been the judgment of this court that, in the absence of special danger or peculiar circumstances, there is no breach of duty to the public in leaving unfenced a pond of water located on private property. The attractiveness of the water or its nearness to a public highway does not take it out of the rule."

CONSTITUTIONALITY OF STATUTE PRESCRIBING QUALIFICATIONS FOR PRACTICING DENTISTRY.—A New York statute requiring dentists to be licensed and prescribing certain educational qualifications was held constitutional in People *v.* Griswold, (N. Y.) 106 N. E. 929. Among other things it provided for a preliminary education equivalent to a four-year high school course registered by the regents, and a professional education in a registered dental or medical school. The defendant in the case who was convicted of practicing dentistry without a license and who was testing the constitutionality of the statute had become a resident of New York three years before his conviction. Prior to that time he practiced dentistry in other states and was licensed to practice in the states of Kansas and Utah. He did not however have the preliminary and professional education required by the New York statute, and his complaint was that for that reason he was not allowed to take the examination which was required of applicants for a New York license to practice dentistry. The language of the court in answer to this complaint was as follows: "It may seem hard that the defendant, who has practiced dentistry for many years in other states, cannot be licensed here, or even permitted to take an examination to test his qualifications, until he first acquires the requisite preliminary and professional education; but it is difficult, if not impossible, to make a classification which will not in particular instances seem unjust. All in the same case as the defendant are treated alike. His fundamental error consists in the assumption that a license to practice dentistry in one state confers the like right in all other states, whereas such license is recognized, if at all, only on principles of comity. When the applicant came into the state he fell into the class of those who had never been licensed, unless the legislature saw fit to recognize the previous experience of those in the like case. We find nothing in the statute which can fairly be said to discriminate in any way against the citizens of other states. The privileges and immunities secured to citizens of each state in the several states by the Federal Constitution are the privileges and immunities enjoyed by the citizens in the latter states, and are not the special privileges enjoyed by the citizens in their own states. Paul *v.* Virginia, 8 Wall. 168, 19 L. ed. 357; Lemmon *v.* People, 20 N. Y. 562. As a citizen of the United States, the defendant is not privileged to practice dentistry in this state without a license so do to."

RIGHT OF "CLAIRVOYANT" TO PRACTICE MEDICINE.—In Massachusetts a statute provides for the registration of physicians. Section 8 prescribes penalties for practicing medicine without being registered, and section 9 excepts from the necessity of registration "clairvoyants" if they do not violate the provisions of section 8. Construing this statute it was held in Com. *v.* Delon, (Mass.) 106 N. E. 846, that the exception in section 9 did not authorize a clairvoyant to practice medicine. The facts showed that the defendant was convicted of practicing medicine, and her defense was that what she did was done by her as a clairvoyant. The commonwealth introduced evidence that two men called on her for treatment; that while asleep, holding the patient's hands, she gave advice to the first and told the second the nature of his sickness; and that in both cases she furnished the patients with medicine for which she was paid. The defendant took the stand in her own behalf and testified that she was not learned in diseases or in medicine; that when consulted by a patient she went into a trance and that while in the trance she was told by "occult force" what the matter with the patient was and what remedy to prescribe; and on coming out of the trance she prescribed what had been revealed to her while she was in it. The judge instructed the jury "that although she [the defendant] be a clairvoyant, in her line of practice, she is not within the exception specified in the statute if, for the cure, prevention or alleviation of any pain, disease or sickness of those seeking treatment from the defendant, she prescribed or directed any drug or medicine, with the expectation of receiving compensation therefor." To this instruction an exception was taken to the Supreme Court, which overruled the exception. Loring, J., said: "Possibly the word 'clairvoyant' might be interpreted to include one who hears communications made by 'occult force' while in a trance. But in the accurate and indeed in the ordinary meaning of the word it is confined to a person who sees, while in a trance, things which by reason of distance or for other reasons are not ordinarily visible. We are of opinion that section 9 of R. L. c. 76, in creating exceptions to the general rule established by section 8 of that act, is to be construed strictly. It follows that the word clairvoyant must be construed accurately. So construed, it does not authorize a defendant to prescribe medicines revealed to him by 'occult force' while in a trance."

CONSTITUTIONALITY OF WAREHOUSE ACT MAKING RECEIPT FOR STORAGE OF GRAIN CONCLUSIVE EVIDENCE OF OWNERSHIP.—The Wisconsin Warehouse Act was declared constitutional by a divided court in Street *v.* Farmers' Elevator Co., (S. D.) 149 N. W. 429. The particular part of the act which the appellant contended was unconstitutional read as follows: "No person,

association, firm or corporation, doing a grain warehouse or grain elevator business in this state, having issued a receipt for the storage of grain, as in this article provided, shall thereafter be permitted to deny that the grain represented thereby is the property of the person to whom such receipt was issued, or his assigns thereof, and such receipt shall be deemed and held, so far as the duties, liabilities and obligations of such bailee are concerned, conclusive evidence of the fact that the party to whom the same was issued, or his assigns thereof, is the owner of such grain and is the person entitled to make surrender of such receipt and receive the grain thereby promised to be delivered." The appellant contended among other things that the statute attempted to take away a fundamental right, and precluded a judicial inquiry into the liability of a warehouseman upon a storage receipt, by a conclusive presumption of fact. The court said: "As we read its brief, the sole basis for its contention is the claim that such section makes the storage receipt conclusive evidence of ownership of the grain, and therefore is an attempt on the part of the legislature to deprive parties of a judicial determination of their rights. We think appellant's error lies in not looking back of the language used and determining the real effect of such section. It is true that, upon its face, it purports to prescribe a rule of evidence; but we think a careful consideration discloses that it proclams a rule of substantive law and not a rule of evidence. As is said by Wigmore, at section 1353 of his work on Evidence: 'On the one hand, so far as a so-called rule of conclusive evidence is not a rule of evidence at all, but a rule of substantive law, it is clear that the legislature is not infringing upon the prerogative of the judiciary.' This same thought is announced by Chamberlayne in his Modern Law of Evidence. . . . While a statute might be unconstitutional which attempted to make certain evidence conclusive as to the person in whom the title to property was vested, when the question of title was material, yet a statute would be unconstitutional which, though purporting to prescribe a rule of conclusive evidence as to such title, yet in effect provides that a person who has assumed a certain relation to another in regard to such property cannot question the title of such person to such property. Section 495 belongs to this latter class, and such section is constitutional. The fact that this statute eliminates all exceptions to the rule that a bailee cannot dispute his bailor's title does not affect its constitutionality. It merely carries the estoppel a little further than the courts were doing without the statute."

CONSTITUTIONALITY OF SEPARATE COACH STATUTE AIMED AT NEGRO RACE.—In McCabe *v.* Atchison, etc., R. C., 35 Sup. Ct. Rep. 69, the United States Supreme Court had under consideration the constitutionality of the so-called "Separate Coach Law" of Oklahoma which provides for separate coaches or compartments for the accommodation of the white and negro races. The main attack on the statute related to a provision that nothing contained in the act should be construed to prevent railway companies "from hauling sleeping cars, dining or chair cars attached to their trains, to be used exclusively by either white or negro passengers, separately but not jointly." The court below held that this provision did not offend against the 14th Amendment, relating to the equal protection of the laws, as these cars were, comparatively speaking, luxuries, and that it was competent for the legislature to take into consideration the limited demand for such accommodations by the one race, as compared with the demand on the part of the other. This conclusion reached by the court below was overturned by the Supreme Court, which spoke through Mr. Justice Hughes as follows: "It is not questioned that the meaning of this clause is that the carriers may provide sleeping cars, dining cars, and chair cars exclusively for white persons, and provide no similar accommodations for negroes. The reasoning is that there may not be enough persons of African descent seeking these accommodations to warrant the outlay in providing them. Thus, the attorney general of the state, in the brief filed by him in support of the law, urges that 'the plaintiffs must show that their own travel is in such quantity and of such kind as to actually afford the roads the same profits, not per man, but per car, as does the white traffic; or, sufficient profit to justify the furnishing of the facility; and that in such case they are not supplied with separate cars containing the same. This they have not attempted. What vexes the plaintiffs is the limited market value they offer for such accommodations. Defendants are not by law compelled to furnish chair cars, diners, nor sleepers, except when the market offered reasonably demands the facility.' And in brief of counsel for the appellees, it is stated that the members of the legislature 'were undoubtedly familiar with the character and extent of travel of persons of African descent in the state of Oklahoma, and were of the opinion that there was no substantial demand for Pullman car and dining car service for persons of the African race in the intrastate travel' in that state. This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor; but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded."

RIGHT OF HEIR MURDERING INTESTATE TO INHERIT.—In Wall *v.* Pfanschmidt, (Ill.) 106 N. E. 785, the facts showed that one of the parties murdered his father, mother and sister, and the question in dispute was whether this act prevented his inheriting property from them under the Illinois statute of descent which did not expressly exclude from its provisions one who became an heir by reason of a murder committed by him. In an interesting and exhaustive opinion Carter, J., speaking for the Illinois Supreme Court reached the conclusion that the manner in which the party in question became an heir did not affect his right to inherit. A part of the opinion was as follows: "In some jurisdictions, as in New York, the conclusion has been reached that while the murderer takes a legal title which is unimpeachable in a court of law, a court of equity will deprive him of the use of the property by enjoining the enforcement of the legal right. In other jurisdictions it has been held that when the statutes make explicit provision for the descent of an intestate's property and specify the causes for which a will may be annulled or set aside, and neither the statute on descent nor on wills includes the case of a murder committed by an heir or devisee in order to obtain the property, the legal title which passes to the murderer under the statute of descent or by will is indefeasible. While this question has never been passed upon by this court somewhat kindred questions have been decided. In Holdom *v.* Ancient Order of United Workmen, 159 Ill. 619, 43 N. E. 772, 31 L. R. A. 67, 50 Am. St. Rep. 183, it was decided that the right of recovery by an insane beneficiary under a policy of life insurance was not forfeited by

his killing the insured under such circumstances that the killing would be murder if the beneficiary were sane. In Supreme Lodge Knights and Ladies of Honor *v.* Menkhausen, 209 Ill. 277, 70 N. E. 567, 65 L. R. A. 508, 101 Am. St. Rep. 239, it was held that the murder of the insured by the beneficiary named in the benefit certificate precluded recovery of the insurance. In Collins *v.* Metropolitan Life Ins. Co., 232 Ill. 37, 83 N. E. 542, 14 L. R. A. (N. S.) 356, 122 Am. St. Rep. 54, 13 Ann. Cas. 129, the insurance company disputed its liability for payment of insurance on the life of one convicted for murder and executed, on the ground that it was against public policy. There was no stipulation in the policy exempting the company and it was held liable for the policy on the murderer's life. . . . Section 11 of article 2 of the Constitution of 1870 provides: 'All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate.' The Criminal Code, in fixing the punishment for murder, states: 'Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years.' Hurd's Stat. 1913, p. 835. It does not state that the guilty person shall forfeit his right to inherit. In Collins *v.* Metropolitan Life Ins. Co., 232 Ill. 42, 83 N. E. 543, 14 L. R. A. (N. S.) 356, 122 Am. St. Rep. 54, 13 Ann. Cas. 129, supra, it was said: These provisions are 'clear and unequivocal declarations of the public policy of this state to the effect that no forfeiture of property rights shall follow conviction for crime.' Public policy does not demand this forfeiture, for the demands of public policy are satisfied by the proper execution of laws and the punishment of crime. If other punishment be required, the duty to so provide rests upon the legislative branch of the government. Whether this accords with natural right and justice is not for the courts to decide. The laws of descent do not depend upon the ideas of court or counsel as to justice or natural right but depend entirely upon the provisions of the statute."

CONSTITUTIONALITY OF STATE STATUTE REGULATING RIGHT OF FOREIGN CORPORATION TO SUE IN THE STATE.—That a state statute regulating and restricting the right of a foreign corporation to sue in its courts may be unconstitutional when applied to an action brought to recover the price of goods sold in interstate commerce is the holding in Sioux Remedy Co. *v.* Cope, 35 Sup. Ct. Rep. 57. In that case the statute under discussion was held unconstitutional. Mr. Justice Van Devanter states the scope of the decision as follows: "It may be conceded in a general way that a state may restrict the right of a foreign corporation to sue in its courts. . . . And in the same general way it may be conceded that a state may restrict the right of such corporations to engage in business within its limits. . . . But the power so to deal with these subjects, like all other state powers, can only be exerted within the limitations which the Constitution of the United States places upon state action. . . . One of these limitations is that before indicated, arising from the commerce clause, whose operation, as this court has said, is such that a corporation authorized by the state of its creation to engage in interstate commerce 'may not be prevented by another state from coming into its limits for all the legitimate purposes of such commerce.' Western U. Tel. Co. *v.* Kansas, 216 U. S. 1, 27. We think that when a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the state cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose. If it were otherwise, the purpose of the Constitution to secure and maintain the freedom of commerce by whomsoever conducted would be largely thwarted by the states and the commerce itself seriously crippled. We are thus brought to the question whether the particular conditions imposed by this statute can be sustained when applied to rights of action like that disclosed in the present case. Without doubt a foreign corporation seeking to enforce such a right in the courts of a state may be required to conform to the prevailing modes of proceeding in those courts, and to submit to the usual rules respecting costs, the giving of security therefor (see Blake *v.* McClung, 172 U. S. 239, 256, 43 L. ed. 432, 438, 19 Sup. Ct. Rep. 165), and the like. But incidents of this character commonly attending litigation may be put out of view, for it is with something quite different that we are here concerned. The conditions which the statute imposes are: First, that the company shall file in the office of the secretary of state an authenticated copy of its charter or articles of incorporation; second, that it shall appoint a resident agent upon whom process may be served in any action against it, and shall file a copy of such appointment in the office of the secretary of state and of the register of deeds of the county where the agent resides; and, third, that it shall pay the fees incident to filing and recording these instruments, approximating twenty-five dollars. It will be perceived that these are the conditions upon which many of the states permit foreign corporations to engage in business within their limits when no constitutional limitation is involved; that is, when the character of the business is such that the state is free to exclude such corporations or to admit them upon terms acceptable to it. But here the conditions are sought to be applied in a different way and to a different situation falling within the reach of the commerce clause. Out of this arises the question of their validity. We think the mere statement of the conditions shows that they have no natural or reasonable relation to the right to sue which they are intended to restrict. They have no bearing upon the merits or any question of procedure or costs, are not directed against any abusive use of judicial process, and are plainly onerous. The second one, respecting the appointment of a resident agent upon whom process may be served, is particularly burdensome, because, as the supreme court of the state has said, it requires the corporation to subject itself to the jurisdiction of the courts of the state in general as a prerequisite to suing in any of them; that is to say, it withholds the right to sue even in a single instance until the corporation renders itself amenable to suit in all the courts of the state by whosoever chooses to sue it there. If one state can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce. As applied to such rights we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause."

New Books.

Addresses of U. M. Rose. With a Brief Memoir by George B. Rose. Chicago: George I. Jones. 1914.

The late U. M. Rose was well known to members of the legal profession throughout the United States; and this was so although his law office was located in Little Rock, Arkansas, and his life

was not given up to political pursuits. A brief sketch of his life in the volume at hand shows that he was born on a farm in Bradsfordsville, Kentucky, in 1834. His father and mother died when he was fourteen, and the estate left being small, he was thrown on his own resources. First he got a place in a country store, and then he hired out as a field hand. Good fortune then came to him in the shape of a kind-hearted lawyer who took the young man to his house in Lebanon, one of the county seats of Kentucky, gave him a home there and had him appointed a deputy clerk of the court. He also started him in the study of the law, which was followed by a period of study in the law school of Transylvania University at Lexington, Kentucky. In 1853 Mr. Rose obtained a license to practice law from the Kentucky Court of Appeals. His health had always been frail, which caused him to commence the practice of law in a small village called Batesville in the state of Arkansas, the climate being milder there than in Kentucky. In 1860 he was named chancellor of the Court of Chancery, which appointment he held for a short time. It was after the Civil War that he settled in Little Rock where he continued to practice his profession with a few interruptions until his death in August, 1913.

Mr. Rose was a close student throughout his life, being a profound lawyer as well as a man of high cultivation with a large knowledge of books. He had a singular charm of manner, was something of a traveler, and a splendid speaker. His biographer relates that early in 1907, Mr. Roosevelt, then president of the United States, passed through Little Rock. At a luncheon given to him Judge Rose responded to a toast in his honor. This made so favorable an impression upon Mr. Roosevelt that he appointed Judge Rose an ambassador to the Hague Peace Conference of that year, along with Mr. Joseph H. Choate and General Horace Porter. In 1877 Judge Rose was offered a seat in the United States Senate, which he declined. Speaking of his political affiliations the biographer says: "He was always a Democrat, and believed earnestly in the ancient principles of that party. But he lent himself to none of the vagaries which it has of late years too often followed. He looked upon the protective tariff as an abomination that led to infinite corruption, and upon free silver as the clamor of the dishonest for a scaling of their debts. He stood firmly with Mr. Cleveland. Indeed, Mr. Cleveland owed his nomination in no small measure to Judge Rose. As head of the Arkansas delegation in the convention that first nominated him, Judge Rose succeeded in throwing the whole vote of the state to Mr. Cleveland; and owing to its alphabetical position near the head of the list, as the votes were called again and again, the solid phalanx of Arkansas evoked much applause and had a decided influence upon the column that followed.'

Most of the volume is given up to addresses made by Judge Rose. They include among others "The Rise of Constitutional Law;" "Concerning Law Reform—Coke and Bacon;" "Immunity from Capture of Private Property at Sea in Time of War;" "Abraham Lincoln;" "Jefferson Davis;" "Confederate Dead;" "John Marshall;" "Changes in the Law and Its Practice in the Half Century of My Observation;" "Trial by Jury in France;" and "Strikes and Trusts." These addresses display much originality and learning, a delightful style and considerable real eloquence. Perhaps the most interesting of the addresses published is the one "Concerning Law Reform." Commenting on the changed conditions in the practice of law owing to the vast number of adjudicated cases, Judge Rose says: "The time was when it was supposed to be a reproach to call one a case lawyer; but now we are all either case lawyers, or are not lawyers at all. Cases are our counters, and there are no coins. Our legal arguments are for the most part a mere casino-like matching and unmatching of cases, involving little or no intellectual effort. The law is ceasing to be a question of principles, and is becoming a mere question of patterns. Often we have to snatch the cases from the vast mouldering heap in haste. Some of them may have been overruled, others may be moribund; some may be like Thoroughgood *vs.* Bryan, overruled by the court that made them, or like Dumpor's Case, repealed by Act of Parliament, but still having a posthumous existence in some of our states. We do not know how the matter may stand; but we walk out on the unsteady footing of these cases to the extreme limit, and marshal the court the way it should go. The judge may be learned; but he may know no more of these particular cases than we do. The familiar sound of Brown *vs.* Jones may awaken some far-off memory like the reminiscences of childhood; and on the faith of that case he may decide the question one way or the other, only to find out afterwards that he was in error, as the case that he recalled was another case between the same inveterate litigants." Elsewhere in the same address appears the following: "A year or so ago, I read what seemed to me to be a very sensible report by one of your committees on the subject of the avalanche of law books that daily issues from the teeming press. Soon afterwards I saw a notice of this report in a publisher's circular, in which the publisher said that if lawyers did not want new books, the remedy was easy; they need not buy them. It was very kind of him to say so; and what he said was true; but it was not the whole truth. Collectively we could refuse to buy such books, individually we cannot. We are like the armed powers of Europe. Each and all would be benefited by a general disarmament, but neither can disarm unless all the rest will do so. As nearly all of our law stands on the shifting sands of individual cases, and as every new case, like every new child that is born, is fraught with unknown possibilities, self-preservation requires that we shall keep up with the disorderly and rapidly moving procession as well as we can; and as we cannot remember one case out of a hundred, even if we had time to read them all, we have to buy digests and text-books without number, good, bad, and indifferent, to serve as convenient indexes. If we fail to act thus, dire will be our fate. If, for instance, we have occasion to refer in argument to the Dartmouth College case, we may apprehend that our adversary, holding aloft a late issue of some reporter, will triumphantly announce that that decision has been overruled by the Supreme Court of Alaska, a fact that he supposed was known to every practicing lawyer; or, if emulating the eloquence of Patrick Henry, we refer to the Magna Charta, our opponent will announce with fiendish exultation that he holds in his hand a book fresh from the press, a book destined to form an epoch in the history of jurisprudence, a mature work on the Statute of Limitations as applied to Estrays, written by a retired minister of the gospel of several years' standing, which demonstrates conclusively that the Magna Charta was never enacted in the manner required by the English constitution. Happy shall we be if we shall be able to produce some printed paragraph saying that the learned judges of the Supreme Court of Alaska have fallen into an error as to the Dartmouth College case, or that the extremely erudite author of the text-book mentioned has drawn his conclusion from insufficient data. Thus it is that we have to buy all the latest books, if for nothing else in order to defend ourselves against the bad law that is constantly being exploded on the profession."

In the address on the "Confederate Dead" will be found this touching and eloquent paragraph: "Nearly twenty years have gone by on rapid wing since the sword was returned to its sheath and the last hostile shot was fired, and as many times

has returning spring shed God's benediction of flowers on these lowly graves; and yet when the sun goes down to-night the aged mother will sit in the waning twilight, and will try to still the beatings of her heart, so that she may hear once more the footsteps of her son in the echoing halls of memory; and the woman whose golden or whose raven hair is streaked with silver, will recall with a silent tear the betrothed of her heart, who sleeps on the field of honor; while many a friend and brother, and father and sister, still mourns for the unreturning brave. To them, and to all of us, sad memories come trooping back from those cruel years to haunt and lay siege to the stricken heart."

In the address on Abraham Lincoln, Judge Rose, a Southern gentleman, has this to say: "Before the assassination of Mr. Lincoln the war had ended. In the South the enormity of the crime aggravated the sense of the general calamity, and excited serious apprehensions that were soon to be realized. During the long war Mr. Lincoln had been grossly misrepresented; but by the time that it closed the Southern people had learned to know him better; and had learned to rely on his charitable judgment; and it was not difficult for them to realize that his taking off was one of the greatest calamities that could have occurred." We would like to quote further from this most interesting volume did space permit. We leave it with regret and with the feeling that it is a book of rare merit.

News of the Profession.

THE KENTUCKY STATE BAR ASSOCIATION will hold its next annual meeting at Frankfort, Ky., on July 8 and 9.

CIRCUIT JUDGE RESIGNS.—Judge Francis A. Whitney has resigned from the bench of the Florida circuit court.

LOUISIANA JUDGE LEAVES BENCH.—Riley T. Wilson of Harrisonburg has resigned as judge of the eighth district court of Louisiana.

OHIO JUDGE DEAD.—Michael Donnelly, one of the judges of the Court of Appeals, Third Ohio district, died at Ann Arbor, Mich., on December 15, 1914.

NEW JERSEY JUDGE RESIGNS.—Judge John E. Foster of the Monmouth County (N. J.) Court has resigned from the bench after eleven years' service.

UNITED STATES SUPREME COURT MARSHAL DIES.—J. M. Wright of Kentucky, marshal of the United States Supreme Court since 1888, died at Washington, D. C., on January 2.

NAMED AID TO UNITED STATES ATTORNEY.—Otto Bock, a Denver lawyer, has been appointed assistant to United States District Attorney Harry B. Tedrow at Denver.

NEW FEDERAL JUDGE FOR ALASKA.—President Wilson has appointed Charles E. Bunnell of Valdez to be judge of the District Court of Alaska, division number four.

RESIGNS FROM BENCH.—Judge George S. Shackelford of the Ninth Judicial District of Virginia, composed of the counties of Culpeper, Orange, Goochland and Louisa, has resigned from the bench.

WYOMING JUDGE DEAD.—Gibson Clark, aged 70, formerly associate justice of the Wyoming supreme court and United States attorney for Wyoming, died at Rawlins, Wyo., on December 15, 1914.

SOUTH CAROLINA BAR ASSOCIATION.—The annual meeting of the South Carolina Bar Association was held at Columbia, S. Car., on January 21 and 22. Further particulars will be given in LAW NOTES for March.

DEATH OF ALABAMA JUDGE.—Judge John T. Lackland, aged 62, one of the best known jurists of Alabama and judge of the first district court for the past nine years, died at Selma, Ala., on December 26, 1914.

NEW YORK STATE BAR ASSOCIATION.—Further mention of the annual convention of the New York State Bar Association, which was held at Buffalo, N. Y., on January 22 and 23, will be made in the next issue of LAW NOTES.

HONORED BY BAR.—Gen. Peter W. Meldrim, recently elected president of the American Bar Association, was honored by the members of the Savannah, Ga., bar, with an elaborate banquet on December 28, 1914.

NEW MASSACHUSETTS JUDGE.—James B. Carroll of Springfield has been appointed a justice of the Massachusetts superior court to succeed Judge E. P. Pierce, who was recently elevated to the supreme court bench.

THE MONTANA STATE BAR ASSOCIATION held its semi-annual meeting at Helena, Mont., on January 5. Jesse B. Root of Butte is president of the association, Joseph Binnard of Butte, treasurer, and V. L. McCarthy of Helena, secretary.

NAMED CIRCUIT JUDGE FOR HAWAII.—Thomas B. Stuart of Denver, twice speaker of the Colorado house of representatives and later a Denver district judge, has been appointed a circuit judge for the Island of Hawaii by President Wilson.

ILLINOIS STATES ATTORNEYS.—The States Attorneys of the State of Illinois held their annual convention in Chicago on December 16 and 17, 1914. Oscar H. Wylie was elected president, and Floyd E. Thompson secretary and treasurer for the ensuing year.

LEGAL PUBLICATIONS MERGE.—Announcement has been made of the merger of the *Green Bag* and the *Central Law Journal*, the latter publication having acquired the subscription list and good will of the former. Mr. Arthur W. Spencer, former editor of the *Green Bag*, has been made assistant editor of the *Central Law Journal*.

JUDGESHIP APPOINTMENTS IN OHIO.—Governor Cox of Ohio has filled the vacancy on the common pleas bench in Van Wert county, caused by the election of Judge E. S. Matthias to the Supreme Court, by appointing Probate Judge Hugh E. Allen to that office. John H. Koch, tax commissioner, has been appointed to succeed Judge Allen on the probate bench.

APPOINTED DISTRICT JUDGE IN COLORADO.—Governor Ammons of Colorado has appointed William D. Wright, Sr., of Denver, district judge to fill the vacancy created by the resignation of James H. Teller, Supreme Court justice-elect. Judge Wright was formerly county judge of Chaffee county and is a past grand master of the Colorado Masonic grand lodge.

MISSOURI SUPREME COURT CHANGES.—Robert T. Railey of University City has been appointed by the Supreme Court of Missouri as a member of the Supreme Court Commission to succeed James T. Blair. Judge Blair has become a regular member of the court, succeeding Chief Justice Henry Lamm, retired. Judge A. M. Woodson has been elected Chief Justice of the court.

THE IDAHO STATE BAR ASSOCIATION held its annual meeting at Boise, Idaho, on January 6, 7 and 8. The official program

included memorial services before the Supreme Court for the late Justice George H. Stewart, Richard Z. Johnson and D. Worth Clark. The president's address, by Franklin Wood, touched on the work of the National Uniform Law Commission. O. O. Haga delivered an address concerning needed legislation to develop the water resources of the state.

THE FAR EASTERN AMERICAN BAR ASSOCIATION, designed to bring into co-operation American lawyers in China, Japan and the Philippines, was formally organized at a meeting held recently in Shanghai. The following officers were elected: President—Judge C. S. Lobingier of Shanghai; vice-presidents—E. P. Allen of Tientsin, and A. P. Bassett of Shanghai; secretary and treasurer—E. B. Rose. The Association hopes eventually to become affiliated with the American Bar Association.

CHANGES IN NEW YORK JUDICIARY.—Just prior to his retirement from office on January 1, Governor Glynn of New York made the following judicial appointments: Clarence J. Shearn to be justice of the Supreme Court, First District, succeeding Justice Samuel Seabury, who was elected to the Court of Appeals bench; Francis B. Delehanty to be justice of the Supreme Court, First District, succeeding Justice Amend, deceased; Lorenz Zeller to be Judge of the City Court of New York, succeeding Judge Delehanty.

THE SOUTH DAKOTA BAR ASSOCIATION held its sixteenth annual convention at Sioux Falls, S. Dak., on January 13 and 14. The official program was as follows: President's address by Hon. Dick Haney of Mitchell; annual address, by Hon. Rome G. Brown, of Minneapolis, on the subject, "The Judicial Recall —An Instrument of Socialism;" paper on "The Classification of Municipal Corporations," by Hon. John Howard Gates of Sioux Falls; paper on "Banking Legislation," by P. C. Morrison of Mobridge; paper on "Responsibility of the Press for the Prevention of Impartial Trials in Criminal Cases," by Howard C. Fuller of Pierre.

NEBRASKA STATE BAR ASSOCIATION.—The fifteenth annual meeting of the Nebraska State Bar Association was held at Lincoln, Neb., on December 28 and 29, 1914. The President's address was delivered by H. H. Wilson of Lincoln. Other addresses were as follows: "A Unified State Court System," by Herbert Harley of Chicago, secretary of the American Judicature Society; "Lawyers and Law Reform," by Judge E. B. Perry of Cambridge; "The Function of the Court in Jury Trials," by William A. De Bord of Omaha. The following officers were elected for the ensuing year: President—C. J. Smyth, Omaha; vice-presidents—R. E. Adams, Dakota City; W. H. Kelligan, Auburn; George T. Gillan, Lexington; secretary—A. G. Ellick, Omaha; treasurer—G. G. McDonald, Omaha; member of executive committee—E. E. Squires, Broken Bow.

WEST VIRGINIA BAR ASSOCIATION.—The thirteenth annual meeting of the West Virginia Bar Association was held at Parkersburg, W. Va., on December 29 and 30, 1914. Col. Robert White, of Wheeling, the president of the association, delivered the opening address. The annual address was by Dr. Hannis Taylor, of Washington, D. C., on the subject, "Roman Law in the New World." Other addresses or papers were as follows: "The Blue Sky Law," by R. S. Spilman, of Charleston; "Review of the Association," by William P. Hubbard, of Wheeling; "Outlook of West Virginia Bar," by Wells Goodykoontz, of Williamson; "West Virginia Debt Case," by Attorney General A. A. Lilly; "Statutory Provisions Relating to Instructions to Juries," by Alex. N. Breckenridge of Summersville; "Some Reminiscences of Lawyers and Judges," by Judge Warren N. Miller of Parkersburg; "Industrial Disputes," by Hon. Taylor Vinson of Huntington; "Commerce, Banquets, and Golf Without," by Hon. John J. Coniff of Wheeling; "Short Cuts," by Andrew Prince; "Judges and Judges," by James A. Wakefield of Pittsburg; "A Fallen Oak," by Judge Ira E. Robinson of the Supreme Court of Appeals. Officers for the ensuing year were elected as follows: President—J. N. Vandervort of Parkersburg; vice-presidents—First district, Charles G. Coffman, of Clarksburg; Second district, Tracy B. Jeffords, of Harpers Ferry; Third district, William G. Conley, of Charleston; Fourth district, Homer Adams, of Harrisville; Fifth district, Cary N. Davis, of Huntington; secretary—Charles McCamic, of Wheeling; treasurer—Charles A. Kreps, of Parkersburg; executive council—William P. Willey, of Morgantown; Nelson P. Hubbard, of Wheeling; Thomas P. Jacobs, of New Martinsville; B. M. Ambler, of Parkersburg, and R. S. Spilman, of Charleston.

OKLAHOMA BAR ASSOCIATION.—The eighth annual convention of the Oklahoma State Bar Association was held at Tulsa, Okla., on December 28 and 29, 1914. The official program was as follows: President's address, by C. O. Blake of El Reno; paper on "Common Law Marriage," by Fred W. Green of Guthrie; paper on "Justice and Procedure," by Frank Wells of Oklahoma City; paper on "Initiative and Referendum," by N. A. Gibson of Muskogee; annual address on "Some Inefficient Tendencies of Current Legislation," by Roberts Walker of New York City. At the annual banquet, the toast list included the following: "Convincing the Court," by F. P. Dillard of Tulsa; "Domestic Relations," by Hon. Eugene F. Scott of Pawhuska; "The Trials of a Judge," by Hon. Walter Humphries of Nowata; "Resignation; Its Causes and Effects," by Judge Farrar McCain; "A Lawyer in Oklahoma Politics," by Hon. S. P. Freeling. Officers were elected as follows: President—George S. Ramsey, Muskogee; vice-presidents—District No. 1, J. Berry King, Tahlequah; No. 2, J. A. Tillotson, Nowata; No. 3, L. J. Roach, Muskogee; No. 4, W. C. Leidke, McAlester; No. 5, T. T. Varner, Poteau; No. 6, D. S. McDonald, Durant; No. 7, Frank H. Reed, Wewoka; No. 8, H. A. Ledbetter, Ardmore; No. 9, John Roger, Holdenville; No. 10, D. G. Eggerman, Shawnee; No. 11, Frank H. Burford, Guthrie; No. 12, J. F. King, Newkirk; No. 13, R. J. Roberts, El Reno; No. 14, George F. Nicholson, Sulphur; No. 15, T. B. Orr, Lawton; No. 17, Charles T. Randolph, Clinton; No. 18, E. H. Gipson, Sayre; No. 19, T. J. Womack, Alva; No. 20, Percy Simons, Enid; No. 21, J. W. Woodford, Tulsa; No. 22, Mark L. Bozarth, Okmulgee; No. 23, Joseph A. Gill, Vinita; No. 24, T. J. Leahy, Pawhuska; No. 25, O. H. Searcy, Frederick; No. 26, George Trice, Coalgate; No. 27, S. E. Welch, Antlers; Secretary—Walter A. Lybrand, Oklahoma City; treasurer—C. K. Templeton, Pawhuska.

English Notes.

A PARLIAMENTARY STORY OF AFFIDAVITS.—The humorous description by Mr. T. M. Healy, K. C., in criticising the censorship of the press by the Government in respect of news from the seat of war, of the Solicitor General, who is responsible for that censorship, as a gentleman not inclined to impart much information as he is an equity lawyer in the habit of drafting affidavits, may recall a good Parliamentary story of affidavits. The late Right Honorable Sir Samuel Walker, who at his death in August, 1911, was Lord Chancellor of Ireland, entered the House of Commons for the first time as an Irish law officer of the Crown. His tendency of mind was far more in the

direction of legal learning and the work of his profession than in that of Parliamentary debate and procedure. On the day he took the oath and his seat on his return to the House of Commons at a by-election, he was observed to sit listlessly on the Treasury bench and to be evidently confused and perplexed. In reply to a friend, who asked him, on the adjournment of the House after a lively debate interspersed with personal incidents, what were his impressions, he replied: "I do not know what to make of the proceedings. It is incomprehensible that gentlemen should be allowed to make statements which have been contradicted and then reiterated and averred without one line of an affidavit on one side or the other."

LEGAL BIBLIOGRAPHY.—A familiar traditional anecdote attributes to George III. the caustic remark that lawyers know the law no better than other people—they only know where to find it in their books. Undoubtedly any one lawyer can scarcely hope to embrace all law within the compass of his acquirement. So varied are the divisions and subdivisions of legal science, and so increasingly complex does it tend to become, that the difficulty of acquiring a complete mastery over it is correspondingly enhanced. With legal literature becoming ever more copious, the need of that comparatively new worker, the legal bibliographer, becomes more pressing. This is so especially in the United States, says the *Law Times*, where the production of law books is carried to a high pitch of excellence. There the legal bibliographer has in recent years done much valuable work. One of the most eminent of these is Dr. Edwin M. Borchard, the law librarian of Congress, who a year or two ago prepared an admirable Guide to the Law and Legal Literature of Germany, which contained likewise an elaborate and extremely useful glossary of German legal terms. Dr. Borchard has quite recently been called away from his library duties to become assistant solicitor to the State department, but he is continuing his bibliographical labors in connection with A Guide to the Law of Spain, which is to be published very shortly by the Library of Congress.

THE SUEZ CANAL.—The state of war between Great Britain and Turkey, and the anticipated belligerent operations with Egypt as their objective, will direct attention to the fact that it is the task of Egypt, under arts. 8 and 9 of the Convention of Constantinople of the 29th Oct., 1888, to secure the carrying out of the stipulated rules for the preservation of the neutralization of the Suez Canal, while the Consuls of the Powers in Egypt are charged to watch the execution of these rules. The attitude of Turkey, as prescribed by the Convention of Constantinople, in respect of the Suez Canal is enunciated in arts. 4, 5, and 6 of that convention, which declare that in time of war, even if Turkey is a belligerent, no act of hostility is allowed either inside the canal itself or within three miles from its ports. Men-of-war of the belligerents have to pass through the canal without delay. They may not stay more than twenty-four hours, a case of absolute necessity excepted, within the harbors of Port Said or Suez, and twenty-four hours must intervene between the departure from those harbors of a belligerent man-of-war and a vessel of the enemy. Troops, munitions, and other war material may be neither shipped nor unshipped within the canal or its harbors, and all rules regarding belligerents' men-of-war are likewise valid for their prizes. To the Convention of Constantinople Great Britain, Austria-Hungary, France, Germany, Holland, Italy, Spain, Russia, and Turkey were parties. Certain reservations under which Great Britain became a party to the Convention with reference to the occupation of Egypt by British forces were waived by the declaration respecting Egypt and Morocco signed at London on the 8th April, 1904, by Great Britain and France. The disembarkation in Egypt of the Australian and New Zealand contingents to assist in the defense of that country before they join the other British troops in Europe is yet another indication that the participation of Turkey in the war will render the continued neutralization of the Suez Canal a matter of difficulty likely to give rise to further international complications.

INTEMPERANCE ON THE BENCH.—In an amusing action for breach of promise of marriage heard in Dublin recently, in which the defense was that the promise had been made by the defendant in a state of intoxication in which he had been deliberately placed by the plaintiff, the defendant on cross-examination was asked: "Now, were you not as sober as a judge?" Whereupon the learned judge who was presiding at the trial renewed the laughter caused by the question by adding to the query, with a playful look at counsel, "Were you not as sober as a King's Counsel?" In days now long gone by, cases of intemperance both on the English and the Irish Judicial Benches were not unknown. Lord Campbell describes a Chief Justice opposing the Pretender, but when intoxicated, as he often was, drinking to his prosperity. Jeffreys and Scroggs were addicted to gross intemperance, and the biographers of Lord Eldon record that he usually drank two bottles of port, three when his brother (Lord Stowell) dined with him, and often four. John Scott, Earl of Clonmell, who was Lord Chief Justice of Ireland from 1784 till 1798, in his diary, dated the 20th Jan., 1785, thus describes one of the puisne judges of the Irish Court of King's Bench: "Boyd is drunken, idle, and mad." Daniel O'Connell, who remembered Boyd, in a conversation embodied in Personal Recollections of O'Connell, by his private secretary, Mr. O'Neill Daunt, describes him as so fond of brandy that he always kept a supply of it in court, upon the desk before him, in an inkstand of peculiar make. His Lordship used to lean his arm upon the desk, bob down his head, and steal a hurried sip from time to time through a quill that lay among the pens, which manœuvre he flattered himself escaped observation. On one occasion it was sought by counsel to convict a witness of having been intoxicated at the period to which his evidence referred. His opponent labored hard, on the other hand, to show that the man had been sober. "Come now, my good man," said Mr. Justice Boyd, "it is a very important consideration. Tell the court truly, were you drunk or sober?" "Oh, quite sober, my Lord," broke in counsel, with a significant look at the inkstand; "as sober as a judge."

AUTOMATIC MACHINES AND HALF-HOLIDAYS.—Must automatic machines, like shops, have a weekly half-holiday? This was the problem which confronted the Divisional Court recently in the case of Willesden Urban District Council *v.* Morgan. An enterprising dairyman had an automatic machine just outside his shop, which was filled with milk before closing time on the weekly half-holiday, and a customer, by inserting a penny, could draw out an equivalent quantity of milk. Proceedings were taken against the dairyman under sects. 4 and 9 of the Shops Act 1912, and it was strenuously argued on behalf of the local authority that the scope of that Act was not merely to ensure a weekly half-holiday for shop assistants, but was intended to do much more—namely, to prevent retail trade being carried on during the particular afternoon. Sect. 4 requires shops to be closed "for the serving of customers" on the half-holiday, and the court, with some hesitation on the part of Mr. Justice Avory, decided that this expression implied personal service, and therefore did not touch automatic machines. The position

under sect. 9 is not quite the same. That section prohibits "the carrying on in any place not being a shop, retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class." In the particular case the court held that the dairyman was not hit by sect. 9 as his automatic machine, placed where it was, was really a part of his shop. There is, however, much to be said for the view presented on his behalf that sect. 9 is merely complementary to sect. 4, and that the carrying on in a place not being a shop of retail trade or business means carrying it on by means of personal service. Any other view would produce this extraordinary result: employees of the automatic supply companies would require to visit all railway stations and a multitude of similar places in order to put the machines out of gear for one afternoon in each week and visit them again the following morning to restore them to working condition! Happily, as the late Lord Russell once put it, the law is not absolutely divorced from common sense.

RIGHT TO LET DOWN THE SURFACE OF LAND.—A rule for the interpretation of inclosure acts, when the right to let down the surface of land by the extraction of minerals from thereunder comes into question, is afforded by such cases as Love *v.* Bell, 51 L. T. Rep. 1, 9 App. Cas. 286, and Butterknowle Colliery Company, Limited *v.* Bishop Auckland Industrial Co-operative Flour and Provision Society, Limited, 94 L. T. Rep. 795; (1906) A. C. 305. They have been explained, as was said by Lord Justice Swinfen Eady when delivering the considered judgment of the Court of Appeal in the recent case of Beard *v.* Moira Colliery Company, Limited, as resting on the change in the nature of the commoners' interest by the inclosure. But, as his Lordship went on to remark, there is no ground for extending any principle which may be found in those authorities to the construction of deeds. And it was a deed—the instrument of severance—that had to be construed in Beard's case (*ubi sup.*). The question was whether the clear and unambiguous words which were used in the clause reserving to the vendor power to enter upon the land conveyed, for the purpose of working, procuring, and carrying away coal, "in as full and ample a way and manner as if these presents had not been made and executed," gave to the parties claiming through him any right to let down the surface of the land by working the minerals. Whether, in other words, "the ordinary proposition" that was referred to by Lord Halsbury, L. C. in New Sharlston Collieries Company, Limited *v.* Earl of Westmoreland, 82 L. T. Rep. 725; (1904) 2 Ch. 443, note, "that a person may do as he likes with his own," sufficed to permit of the letting down of the surface being hazarded. In the ruling that a vendor, when reserving the power to work minerals under land conveyed by him, gains the right for himself and those claiming through him to let down the surface thereof, the purchaser of the surface is deprived of his common law right of support. What was attempted to be established was that the cases relating to the inclosure of lands by lords of manors had modified and restricted the meaning to be attributed to the language in question in the present case. But of the soundness of that contention the appellants failed completely to convince the learned judges of the Court of Appeal. And by affirming the judgment of Mr. Justice Eve on this point, their Lordships have placed beyond controversy in future the circumstance that purchasers of land from which all minerals have been excepted may have to submit to a possible jeopardy to the property that they have acquired.

THE PASSAGE OF AEROPLANES OVER NEUTRAL TERRITORY.—The protest of the Swiss Government against the action of the allies' airmen in flying over Swiss territory as a breach of Swiss neutrality will direct attention to the fact that difficulties in reference to matters affecting the neutrality of Switzerland have powerfully tended to the evolution of international morality, and have established the doctrine that the passing of belligerent troops through a neutral state is a violation of neutrality. The right of passage through neutral territory, as it has been termed, has been gradually extinguished, although the idea that a neutral state could grant a passage through its territory to a belligerent army without a violation of its neutrality, certainly in the event of its being granted impartially to both belligerents, was upheld by leading publicists down to the earlier part of the nineteenth century. That right, however, has not been exercised—if we omit the recent invasion of Belgium, which could not be included within its limits—since 1815, when the allies forced the Federal Council of Switzerland to grant permission for the passage of troops across its territory on their way to invade the southeastern portion of France. The opinion of recent publicists that the right no longer exists has been vindicated by the refusal of Switzerland in 1880 to grant permission for bodies of Alsatians enlisted for the French army to cross her frontiers, although they were traveling without arms or uniforms. Aviation being an entirely new factor, no international regulations governing it have yet been enunciated. While the British and the French Governments have expressed regret to the Swiss Government at the incident, England declines to admit that any Government possesses a sovereignty in the air over its territory. It, however, seems to be difficult, if not impossible, to draw any distinction between the passage of belligerent troops through neutral territory and the passage of belligerent aeroplanes in the air over that country, the consequences to belligerents being in both cases strictly similar in their character. If the passage of belligerent troops through neutral territory is rightly regarded as a violation of neutrality, the passage of aeroplanes over neutral territory can scarcely be otherwise regarded, if reliance be placed on the principle *Cujus est solum ejus est usque ad coelum*. The tendency will probably be in the direction of acknowledging the rights of each country to the control of its own atmosphere. The hint of the Swiss Government that their troops have been ordered to attack belligerent aeroplanes will recall the fact that permanently neutralized states such as Switzerland and Belgium, while denied the right, under the conventions securing their integrity, of making war as sovereign states, are at liberty to engage in defensive warfare, and are allowed to enter into compacts for purely defensive purposes that might involve them in hostilities. The maintenance of the Swiss and Belgian forces is solely for the purpose of self-defense as distinguished from aggressive warfare.

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Obiter Dicta.

MUSICAL SNAKES.—Booze *v.* Humbird, 27 Md. 1.

BORN TO BLUSH UNSEEN!—Cecil *v.* Negro Rose, 17 Md. 92.

SOUNDS LIKE A PAIR OF LOVERS.—Oney *v.* Lovely, 151 Ky. 651.

ARSENIC?—"While the dead body of his friend was yet green."—Per Phillips, J., in Monmouth Investment Co. *v.* Means, 151 Fed. 167.

APPERTAINING TO GRAVEYARDS.—Said the court in Pinchback *v.* Graves, 42 Ark. 227: "The business and judicial history of America is strewn with the wrecks of infants' fortunes."

NOT PECULIAR TO OHIO.—"It may almost be said to be a part of the common law, that an Ohio man may occupy as many offices as he can be elected or appointed to."—See State *v.* Gebert, 31 Ohio Cir. Ct. 355.

A BIRD OF A COURT.—"To sail well the two wings of the court should flap together. (I use the figure merely to illustrate, and not to designate the court as a bird.)"—See Wanger *v.* Marr (Mo.) 165 S. W. 1032.

CONCEDING SUPERIORITY—IN NONLEGAL MATTERS.—"The calculation was hurriedly made, and may not be entirely accurate. Counsel in this case are probably better mathematicians than the writer."—See Barnes *v.* Keys, 36 Okla. 10.

"A LITTLE LEARNING."—"Somewhat like the writer described by Byron as having just enough of learning to misquote, the testator seems to have been just sufficiently acquainted with technical terms to misapply them."—Per Lord Atkinson, in Lightfoot *v.* Mayberry, [1914] A. C. 794.

LIKE TENNYSON'S BROOK.—"One must be imbued with the spirit of prophecy to foretell when a lawsuit will end. It may drag its weary length along until starvation stares the hopeless creditor in the face while the debtor grows fat in the possession of her property."—See Morton *v.* Morris, 27 Tex. Civ. App. 268.

LEGALLY DEFINED.—The Missouri Supreme Court has defined the word "recalcitrant," especially in its application to corporate stockholders, as "a learned term (allowed to those using the venerable language of the law) interchangeable with the colloquialism, 'kicking,' and literally meaning kicking back."—See Ex p. Brockman, 233 Mo. 153.

HAD NO JURISDICTION.—Says the court in Holton *v.* Holton, 64 Oregon 296: "Jurisdiction over the subject-matter of a suit cannot be acquired by a mere amendment subsequent to the final submission of the cause. Archimedes boasted, 'Give me a place to stand and I will move the world.' So it is, in order to give a court authority to move affirmatively in a suit, it must first have jurisdiction over the subject-matter." Carrying out the simile, it becomes apparent that the only thing Archimedes lacked was jurisdiction.

A GENTLE HINT.—In Banigan *v.* United States Rubber Co., 22 R. I. 452, the court said: "When we contemplate the sublime altitudes of the aggregate salaries received by the officers of the defendant in their multiple capacities as officers, members of the executive committee, officers of sub-companies, etc., as compared with the modest stipends allotted to judicial officers, we confess that we feel somewhat dizzied; and we acknowledge our incompetency to grapple with the problem of revising the action of the executive committee and of the directors. Still, it is incumbent on us to undertake the task." After which, the court without a trace of mental dizziness and by way of emphasizing its idea as to what a real salary should be, fixed the salary in controversy in the case at $17,500 per year.

CONCERNING REFINEMENTS.—By our old friend Judge Lamm: "To predicate negligence on two seconds of time is in and of itself a monumental refinement. We cannot adjudicate negligence on such pulse beats and hairsplitting, such airy nothings of surmise. It will be time enough for courts to undertake to do that when they are able to do what Samuel Butler, nigh unto three hundred years ago, said his hero (?) did, viz:

> 'He could distinguish and divide
> A hair 'twixt south and southwest side.
> For he by geometric scale
> Could take the size of pots of ale.
> And wisely tell what hour o' the day
> The clock does strike by algebra.'"

See Rollison *v.* Wabash R. Co., 252 Mo. 541.

ADVICE FROM ABOVE AS DEFENSE.—The case of Hively *v.* Golnik, 123 Minn. 498, may well serve as a warning to persons who profess to be called of God on particular occasions, generally when they want to do something wrong. Whatever may be the law in the heavenly courts, advice from above is no defense in an earthly tribunal. In the case cited, the defendant was sued for breach of promise of marriage. With respect to one of his grounds of defense the court said: "Defendant dwells sadly on his own precarious mental and physical state, and his troubles, but says not a word to explain or excuse his attitude. He seems to have prayed for light, and to have received advices that it was God's will that they should part. Such a command may serve to salve the conscience of the breaker, but it may not serve as an excuse in law for the breach."

FIGHTING FIRE WITH FIRE.—In Williams *v.* Vincent, 70 Kan. 595 a debtor was trying to convince the court that his bowling-alley was exempt from seizure and sale on execution as a tool or implement of his business. He claimed that he had the same rights as the fiddler in the case of Goddard *v.* Chaffee, 2 Allen (Mass.) 395, and enforced his argument by an illustration from the thrilling drama of Richelieu, as follows: "As around the sacred form of his beloved niece the aged cardinal drew the magic circle of the church at Rome, the precincts of which no myrmidon of the temporal law dare penetrate, so around certain things the people of this commonwealth have erected a barrier to penetrate which no court can issue a writ sufficiently forceful, and among these certain things are 'the necessary implements of a person used and kept in stock for the purpose of carrying on his business.'" The court was not impressed with the comparison of a fiddle and a bowling-alley, but the debtor's oratory evidently made a hit, for the court answered him in kind, saying: "The fiddler, however, could operate his own fiddle with some profit; but the debtor in this case might enter his alley in the morning when the sun's flamboyant beams of gold and fire first break upon the still and pulseless world, and stay there until its expiring rays ensanguine the cloud heaps of the west with an angry dye, making the vibrant earth to tremble with the thunder of his rumbling balls and shivering the circumambient air with a crash of his stricken pins, without making a cent, or even arousing a suspicion that he was at work, or was using the tools and implements of any kind of trade or business."

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Law Notes

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Germany's "Paper Blockade."

BY an order of the German Admiralty, the waters around Great Britain and Ireland, including the whole English Channel, are declared a war zone from and after February 18th, 1915. Every enemy merchant ship found in this war zone will be destroyed, the order reads, even if it is impossible to avert dangers which threaten the crew and passengers. Neutrals are therefore warned against further intrusting crews, passengers and wares to such ships. Their attention also is called to the fact that it is advisable for their ships to avoid entering this area, for even though the German naval forces have instructions to avoid violence to neutral ships, in so far as they are recognizable, in view of the misuse of neutral flags and the contingencies of naval warfare, their becoming victims of torpedoes directed against enemy ships cannot always be averted.

This announcement has been spoken of as a blockade. It can of course have no such standing in international law. A blockade in order to be valid and binding upon neutral vessels must be effective, that is to say, maintained by a force sufficient really to prevent access to the ports of the enemy. *The Peterhoff,* 5 Wall. (U. S.) 28. "No paper or constructive blockade is allowed by international law," said Chief Justice Chase in the case cited. "When such blockades have been attempted by other nations, the United States have ever protested against them and denied their validity. Their illegality is now confessed on all hands. It was solemnly proclaimed in the Declaration of Paris of 1856, to which most of the civilized nations of the world have since adhered; and this principle is nowhere more fully recognized than in our own country, though not a party to that declaration." To the same effect is the language in Wharton's International Law Digest, § 359: "A proclamation or ideal blockade of an extensive coast, not supported by the actual presence of a naval power competent to enforce its simultaneous, constant, and effective operation on every point of such coast, is illegal throughout its whole extent, even for the ports which may be in actual blockade; otherwise every capture under a notified blockade would be legal, because the capture itself would be proof of the blockading force."

While the German Admiralty's declaration was clearly not intended as a notice of blockade, it is undoubtedly expected that it will have some of the practical effects of a blockade. Indeed, a number of the German papers speak of the announcement as a blockade. The Berlin *Post,* for example, declares it is a blockade and that it must be so considered. "Neutral shipping," says the *Post,* "is given time to take refuge in safe harbors. Only after a measured period do all merchantmen going to and from the British Isles run into danger. Then, to be sure, men and freight, not only on British ships, but under a neutral flag, are doomed to sink."

Even though the declaration of the British coast waters as a war zone is not a blockade, if it is true, as the Berlin *Tages Zeitung* says, that "Germany has systematically prepared and organized means for a submarine trade war and has completed the encircling of Great Britain," the declaration bodes a serious menace to British as well as neutral merchant shipping. The British government may retaliate against German trade by putting food stuffs on the contraband list and thus attempt to cut off Germany's food supply by water. The great war, in short, appears to have reached a critical stage, and the time may be opportune for the international conference of representatives of neutral nations to discuss means of ending the war, which is provided for in Senator La Follette's resolution that is now pending in Congress.

Flying of False or Neutral Flag.

THE hoisting of the American flag recently by the Cunard liner *Lusitania* when making port at Liverpool has caused considerable discussion in official and diplomatic circles. An official friendly warning in the matter has been sent by the United States Government to Great Britain. The government note, reserving for future consideration the legality and propriety of the deceptive use of the flag of a neutral power in any case for the purpose of avoiding capture, respectfully points out to His Britannic Majesty's Government the serious consequences which may result to American vessels and American citizens if this practice is continued, especially in view of the announced purpose of the German Admiralty to engage in active naval operations in certain delimited sea areas adjacent to the coasts of Great Britain and Ireland. The note was based in part upon the statement issued by the British Foreign Office defending the use of the flag of a neutral country by a belligerent vessel in order to escape capture or attack by an enemy. This statement was made apropos of the *Lusitania* incident, and was issued with reference to the German Government's charge that Great Britain had ordered British mercantile shipping to fly neutral flags, in violation of international law. The statement was to the effect that the use of a neutral flag is, with certain limitations, a well-established practice as a *ruse de guerre;* that its only effect, in the case of a mer-

chantman flying a flag other than her own national flag, is to compel the enemy to follow the ordinary obligations of naval warfare and satisfy himself as to the nationality of the vessel and the character of the cargo by examination before capturing her and taking her before a prize court for adjudication. The British Government, the Foreign Office statement says, has always considered the use of British colors by a foreign vessel as legitimate for the purpose of escaping capture. Such practice, it says, not only involves no breach of international law, but is specifically recognized in the law of England, notably the Merchant Shipping Act of 1894, which provides: "If a person uses a British flag and assumes the British national character aboard a ship wholly or partly owned by persons unqualified to own a British ship, for the purpose of making the ship appear to be British, the ship shall be subject to forfeiture unless the act was done for the purpose of escaping capture by an enemy or by a foreign warship in the exercise of its belligerent right."

There is abundant precedent for the use of false flags in time of war. Indeed, it appears to be a well-settled principle in international law that it is legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action. The only limitation is that a vessel using the enemy's flag must hoist its own flag before beginning an actual attack. Hall on International Law (4th ed.) § 187. The statement of a Press Association special correspondent at Scarborough that a spectator had asserted that he saw that the attacking German ships which bombarded that town had hoisted the British ensign would, if verified, show a grave breach of international law if the British ensign remained hoisted after the bombardment had begun. At sea, as on land, the use of false colors in combat is forbidden. When a vessel is summoned to lie to, or before a gun is fired in action, the national colors should be displayed. It is, however, lawful to use false colors as a ruse, as Nelson did when he lay off Barcelona for a long time showing the French flag, with the object of drawing out the ships of Spain, then allied with France. When such preliminaries are over and the combat actually begins the national colors should be hoisted. Professor Oppenheim thus expounds the doctrine with respect to the use of a false flag in warfare, for the purpose of stratagem as distinguished from deceit: "As regards the use of a false flag, it is by most publicists considered perfectly lawful for a man-of-war to use a neutral's or the enemy's flag. On the other hand, it is universally agreed that immediately before an attack a vessel must fly her national flag, since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain who is friend and who is foe." The United States Naval War Code forbids the use of false colors altogether, although as late as 1898, during the war with Spain in consequence of the Cuban insurrection, two American men-of-war made use of the Spanish flag. There is, however, an obvious difference between the use by a belligerent of the enemy's flag and his use of a neutral flag under the conditions that will prevail in British waters as a result of the war-zone declaration of the German Admiralty. If this declaration is put in force the general use of the American flag by British vessels traversing those waters would, as the United States Government note points out, be a serious and constant menace to the lives and vessels of American citizens.

It is gratifying to note that the State Department communication to the British Government has been received in England in the friendly spirit in which it was sent. The London *Times*, in its comment on the note, says:

"The note will, of course, be received in the spirit in which it is written. The fair and reasonable attitude which America has observed in regard to all problems raised by the war has strengthened our customary desire to respect not only her rights but her wishes and susceptibilities. While we consider the use of a neutral flag an undoubted right, it is a right which we are most unlikely to exercise so as to expose neutrals to serious peril and inconvenience.

"The exceptional severity with which the censor now treats American news makes it difficult to learn the American opinion as fully as desired, but the *Tribune* is perhaps right when it asserts that the interest in the flag incident would be purely academic were it not for Germany's extraordinary version of the rules of warfare."

Conciliation Courts.

There has been established at Chicago as a branch of the Municipal Court a so-called concilation court, wherein, in cases involving less than fifty dollars, parties may appear without attorneys and have their grievances adjusted by the court. The court was established following the report of the committee of judges appointed to visit and inspect a similar court at Cleveland. The general character of the new court will be seen from the recommendations made by this committee in its report. The judges constituting the committee recommended that the cases be made returnable to the new branch of the court or to any other branch of the municipal court where they might be disposed of expeditiously, and that in all cases coming under the jurisdiction of the conciliation branch continuances should be discouraged. That all such cases should be disposed of on the same day upon which they are returned if possible. That lawyers be not disbarred from appearance for either the plaintiff or the defendant, but that their appearance be discouraged by the court and they be denied the right to examine or cross-examine either party to the suit except when given permission to do so by the court.

The new court appears to be an excellent idea. In most of the cases that will be within its jurisdiction the law points will not be abstruse nor will the facts be complicated. In elucidation of the facts and the determination of the law, therefore, the court will not need the assistance of counsel. Moreover, the small amounts involved in these cases ought not to be frittered away in costs and attorney fees. It can hardly admit of doubt that the public welfare would be served by the establishment of conciliation courts in every community. And their jurisdiction might well be extended beyond the narrow limits prescribed at Chicago. The natural tendency of such courts would be, of course, to diminish law business and per consequence reduce the number of lawyers. This might not be an unmixed calamity, since the personnel of the bar might be much improved by the elimination of a large proportion of those of its members who are principally busied in rendering dispensable services.

Relief for the Supreme Court.

Bills to speed up justice in the United States Supreme Court are now pending in Congress. These bills aim to restrict the number of cases which may reach the

Supreme Court, with a view to enable that court to keep abreast of current business. In view of the large number of cases that have come to the Supreme Court each year from Porto Rico, the bills would substitute for the right of appeal to the Supreme Court from the federal district court in Porto Rico the right of appeal to the Circuit Court of Appeals in New England. The bills also would restrict the Porto Rican cases before the Supreme Court by providing that cases of local or general law decided by the Porto Rican Supreme Court cannot be brought to the United States Supreme Court without the latter's permission. The same limitation would be placed on cases from the Hawaiian Supreme Court. Decisions of circuit courts of appeal in trademark and bankruptcy cases would be final except where the Supreme Court grants permission to appeal.

These reform measures, it appears, were initiated by the American Bar Association. There will doubtless be little opposition in Congress to their enactment into law, and when put into effect they should do much to relieve the congestion of cases in the Supreme Court and enable Chief Justice White to realize his ambition to have the docket of the Court cleaned up each year before the summer adjournment.

The Green Bag—In Memoriam.

THE passing of the *Green Bag* will bring back to its old subscribers pleasurable recollections of the early issues of that periodical when it was published under the unique sub-title "A Useless but Entertaining Magazine for Lawyers." Beyond question it was entertaining, and therefore it was not useless. Its interesting biographic articles on eminent judges and lawyers which emphasized the human rather than the legal side of these luminaries, the well-told stories about law and lawyers and its other contents which were all cast in a light vein and designed to amuse and divert rather than to instruct, made the *Green Bag* a most welcome monthly visitor. In an evil hour it became ambitious; it left the vaudeville stage of legal journalism and went into the "legitimate." In abandoning a field that it had made peculiarly its own for one in which there was no dearth of tillers and husbandmen, it was inevitable that its struggle for existence should have become keener. It is no disparagement to the subsequent work and standing of the *Green Bag* to say that many lawyers who had found refreshment and professional stimulus in its pages were chilled and estranged when it took up and largely confined itself to the weightier matters of the law. For it was like substituting for the genial and jovial comradery of a friend the austere stiffness of the schoolmaster. And it is quite conceivable that the change in the character and policy of the magazine gave it a lessening hold upon the legal profession that has now culminated in its absorption by another publication.

Double Compensation to Executor Acting as Trustee.

AN interesting question in the law of executors and administrators has been raised in the Surrogate Court of New York City. The surrogate has granted a citation directing Frederick N. Judson, a prominent lawyer of St. Louis, to show cause why he should not be removed as one of the executors of the will of Joseph Pulitzer, late proprietor of the New York *World* and the St. Louis *Post Dispatch*. The application for the citation was made by the guardian of the minor grandchildren of Mr. Pulitzer, and was based on the ground that Mr. Judson had renounced the specific provision of $50,000 for each executor made by Mr. Pulitzer in lieu of the usual executor's commission, which would have amounted to much more, and had elected to receive the regular commissions. Mr. Judson, it seems, has submitted to the estate a bill for $114,000 for services to November 30, 1913. It is contended that in refusing the terms of compensation for the executors as provided by the testator, Mr. Judson practically renounced his designation as one of the executors. It appears, however, that a codicil to the will provides that Mr. Judson is to act as executor until Joseph Pulitzer, Jr., a son of the testator, reaches the age of thirty. It is probable, therefore, that Mr. Judson claims, or will make the claim, that in addition to his ordinary duties as executor he is a trustee for the son and is entitled to compensation as such trustee in addition to his compensation as executor. The right of an executor who also acts as trustee to double compensation has been recognized in a number of cases. In *Pitney* v. *Everson,* 42 N. J. Eq. 361, wherein it is squarely held that if a person be appointed in a will an executor and trustee he is entitled to commissions in each capacity, the court speaking through Beasley, C. J., said: "In my opinion a man must act in one or the other of such capacities, and he cannot, in his administration of any part of the property committed to him, be said to act in a duplex character, for each act done must, in contemplation of law, be that of an executor or that of a trustee. Nor can a testator, even by the use of express terms for the purpose, create an office compounded of the two distinct offices of executor and trustee, for when the requisite conditions appertaining to persons and property exist, the law itself imperatively declares that such state of affairs produces a trust. If the situation, in point of law, plainly denotes a trusteeship, the testator cannot convert it into an executorship by calling it such."

It is held, however, in *McAlpin* v. *Potter,* 126 N. Y. 285, that double commissions to the same person, first in the character of executor and then in that of trustee, are to be awarded only when the will contemplates a several and separable action in each capacity, not at the same but different stages of the administration, and that they are not to be allowed where the will makes no such separation, but blends the two duties and commingles them without a severance. "To the ordinary duties of an executor," says the court, "may be added the performance of a trust in such a manner that the two functions run on together. It is the duty of an executor as such to pay a legatee the amount of the legacy in the manner and at the time provided by the testator, and it does not change that duty that the payment of the principal is postponed and the income made payable annually in the meantime. A trust duty may thus be imposed upon an executor which thereby becomes and is made a function of his office. A will must go further than that to admit of double commissions, and must clearly and definitely indicate an intention of the testator to end the executor's duty at some point of time, and require him thereupon to constitute and set up one or more several trusts, to be held and managed as such for the interest of the beneficiary."

It appears not to have been Mr. Pulitzer's intention that Mr. Judson should act in any dual capacity. His executorship was simply to be continued until the specified

legatee should reach the age of thirty. There was no provision in the will for increased compensation for this extended period of service, and it would seem, in view of the specific provision in regard to the compensation of the executors that no intention can be implied that extra compensation was to be paid. It is obvious that it will make a considerable difference to the Pulitzer estate whether Mr. Judson serves the full period of his executorship for the compensation provided in the will or for commissions in accordance with his own claims. These claims would seem to afford a sufficient basis for an application for his discharge as executor. In a discharge under such circumstances there would, of course, be no implication of unfitness in Mr. Judson to perform the duties of the office.

The Tight Skirt in Court.

A DECISION that is bound to create surprise and consternation among the feminine members of the community is the one recently rendered in a western court to the effect that when a woman wears a skirt so tight that it interferes with the free use of her limbs she cannot maintain an action for personal injury. The skirt, the court holds, is contributory negligence. The decision was made in a suit for damages brought by a woman against a railroad company wherein the plaintiff alleged that in alighting from a train one of her feet caught and the ankle was broken. The defense, which the court held to be a valid one, was that because of the height of the heels on her shoes and the tightness of her skirt she was equally at fault. To the feminine mind this ruling will, we imagine, be utterly incomprehensible, and a high soprano chorus of disapproval and protest will go up against it. Do judges not know, or should they not know, that the decrees as to feminine fashions are inexorable, and that women, willy-nilly, are bound to obey them? And should not judicial notice be taken of these decrees, and all things be held subservient to them? In the instant case the accident was doubtless due to the fact that the steps of the railway coach from which the plaintiff attempted to alight were of the usual length and distance from the station platform, and therefore entirely unsuited to a safe and decorous exit by a lady fashionably attired in a thirty-two inch skirt. Manifestly the railway company should have been charged with negligence in not having changed the platform steps of its coaches to suit the restrictive locomotion which the new style of skirt had enforced upon female passengers. Such will undoubtedly be the consensus of feminine opinion upon the subject; and feminine opinion, as everybody knows, is always based on a certain remarkable clarity of vision that sees things in their just and true relations unobscured by the principles and precedents that becloud the masculine mind.

THE KANSAS COERCION STATUTE

THE Kansas so-called coercion statute, making it unlawful for employers to require employees to renounce their union affiliations as a condition of securing or continuing employment, has been declared unconstitutional by the Supreme Court of the United States. The court was, however, divided upon the question, Justices Holmes, Day and Hughes being of the opinion that such a statute is constitutional. "The court intimates nothing inconsistent with the right of individuals to join labor unions," said Justice Pitney, in announcing the decision of the court.

"Nor is the legitimacy of such organizations questioned so long as they conform to the laws of the land as others are required to do. But the individual has no inherent right to join the union and still remain in the employ of one who is unwilling to employ a union man, any more than the same individual has a right to join the union without the consent of that organization.

"Just as labor organizations have the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men, and just as a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any non-union man, so the employer has the constitutional right to insist that the employee shall refrain from affiliation with the union during the term of employment.

"There cannot be one rule of liberty for the labor organization or its members and a different and more restrictive rule for employers.

"The employee's liberty of making contracts does not include a liberty to procure employment from any unwilling employer or without a fair understanding. Nor may the employer be foreclosed by legislation from exercising the same freedom of choice that is accorded to the employee.

"To ask a man to agree in advance to refrain from affiliation with the union while retaining a certain position of employment is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other, for 'it takes two to make a bargain,' and, having accepted employment on those terms, the man is still free to join the union when the period of employment expires; or, if employed at will, then at any time upon simply quitting the employment. And, if bound by his own agreement to refrain from joining the union during a stated period of employment, he is in no different situation from that which is necessarily incident to contracts in general.

"For constitutional freedom of contract does not mean that a party is to be as free after making the contract as before; he is not free to break it without accountability. Freedom of contract, in the very nature of the thing, can be enjoyed only by being exercised; and each particular exercise of it involves making an engagement which, if fulfilled, prevents for the time any inconsistent course of conduct."

Justice Day in his dissenting opinion upholding the statute asks pertinently: "Could an employer not be forbidden from demanding agreements that an employee should not join the national guard? Could not the state strike down agreements not to join a certain political party? Why not labor unions, whatever members of this court may think of these unions?" "Wherein is the right of the employer to insert this stipulation in the agreement any more sacred," continues Justice Day, "than his right to agree with another employer in the same trade to keep up prices? He may think it quite as essential to his 'financial independence,' and so in truth it may be, if he alone is to be considered. But it is too late to deny that the legislative power reaches such a case. It would be difficult to select any subject more intimately related to good order and the security of the community than that under consideration, whether one takes the view that labor organizations are advantageous or the reverse. It is as much within the legislative power as restraint of trade. The law should be as zealous to protect the constitutional

liberty of the employee as it is to guard that of the employer. The principal object of this statute is to protect the liberty of the citizen to make such lawful affiliation as he may desire with organizations of his choice. It should not be necessary to the protection of the liberty of one citizen that the same right in another citizen should be abridged or destroyed."

By the decision in this case the statutes of fourteen states are invalidated. The states affected are California, Colorado, Connecticut, Indiana, Kansas, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, and Wisconsin. There is a similar statute, it appears, in Porto Rico, which also falls by the decision. It would hardly be seemly to enter upon a discussion of the merits of the case, although the existence of debatable ground is amply evidenced by the strong minority dissent from the decision. What should be noticed, however, and soberly reflected upon, is that the enactment of nearly a third of the states relating to a matter of great public concern is set at naught by a judicial interpretation that lacks the sanction of a unanimous court. And it has not been an uncommon occurrence that matured legislation that has already been threshed out in its legal and constitutional bearings has been invalidated by a divided court. Right here appears to be a weak spot in our governmental machinery: the popular will as expressed in legislative enactments can be thwarted by a majority of the court that may hold the enactment to be violative of the constitution. Time was when it was a mooted question whether the assumption by the courts of the right to declare a statute invalid was not an usurpation of power. That question has been definitely and effectually settled in the negative. But when a statute is nullified there should be no uncertainty as to its being obnoxious to the organic law. And who will say that there is no uncertainty when a minority of the able jurists that adorn our highest courts dissent from the decision which invalidates the statute? One accused of crime is not condemned except by a unanimous verdict. Should a statute be condemned except by a a unanimous court?

POINTS OF LEGAL ETHICS.

From the New York County Lawyers Association. Committee on Professional Ethics.

Question. A, B, C, D, E and F are members of the Bar, practicing under the firm name of A, B, C & D. After many years of large and successful practice, there comes a time when A dies, B retires and C enters a judicial office which disqualifies him from practice.

May D, E and F continue to practice in the firm name of A, B, C & D, by filing a certificate under the copartnership laws, or otherwise?

Of course, the practice of the law has its business aspects, but may it be treated thus as a *business* rather than as a profession, or the exercise of a personal privilege?

Is an appearance by such firm an appearance by "attorney" within the meaning of Section 55 of the Code of Civil Procedure? Is practice by such a firm consistent with the other provisions of the Code and of the Judiciary Law regulating attorneys?

Answer. This inquiry includes questions of law, as to none of which this Committee expresses any opinion (but see Matter of Kaffenburgh, 188 N. Y. 49). Dealing with the question of professional propriety only,—

1. In the opinion of the Committee, it is improper for lawyers to continue to practice under a firm name which contains the name of a former partner who has been elevated to the Bench, unless the name of such former partner is also that of one of the continuing members of the firm. A Justice of the Supreme Court or a Judge of a Court of Appeals, and (in certain counties) a County Judge or Surrogate, is forbidden by the Constitution (Art. VI, S. 20) to practice law himself, and his former associates should not, therefore, practice in his name. Were there no constitutional impediment, the criticism likely to be evoked by such a course is sufficient cause to disapprove it.

2. In the opinion of the Committee, and in view of many well-known instances, there is no impropriety in the continued use by surviving or continuing members of a legal copartnership of a firm name which contains the name of a deceased or retiring partner, provided the provisions of the Partnership Law (if applicable) are complied with, and provided, further, that there are no special circumstances, such as the disbarment of the retiring partner or his elevation to the Bench, which would make such a course improper. (See Matter of Kaffenburgh, 188 N. Y. 49.)

Question. A highly respectable, well-established real estate firm are purchasing options upon real estate which is subject to building restrictions. Whether they obtain options or not on all of the lots in the tract, they are entering into agreements with the owners to remove the restrictions at a certain sum, and simultaneously therewith taking a retainer from the owners of the property to an attorney named, authorizing him to institute suit to remove said restrictions, and stipulating in the retainer that the attorney is to look to the real estate firm for his compensation. Therefore the real estate firm enters into an agreement with the attorney to institute the actions and agrees to pay him his disbursements, and if he succeed, a sum less in amount than the said real estate firm is receiving. The attorney does not depend upon the owners paying the real estate firm. He receives his money direct from the real estate firm, and the real estate firm must collect their charges from the owners.

Query: Does the attorney transgress professional ethics?

Answer. In the opinion of the Committee the action of the real estate firm in securing the retainer for the lawyer, under the circumstances, amounts to an offer of his services for a consideration moving to the real estate firm, and we disapprove of the participation of the lawyer therein. Such trading in the services of a lawyer detracts from the essential dignity of the profession. The Committee considers that arrangements of joint adventure, where an intermediary exploits an attorney for its own profit, are to be discouraged by reputable members of the profession.

Question. When an accused person has deposited cash bail for his appearance for trial on a criminal charge and has also made a deposit of money with his lawyer, subject to the order of the accused, in case of conviction, and the bail is forfeited—

1. Is it improper for the lawyer to honor an order from his client who has fled to Canada, directing the payment to one outside the State of the deposit made with his lawyer?

2. Is it incumbent upon the lawyer to advise the police officials of the receipt of a communication from his client disclosing his whereabouts and enclosing such order?

Answer. In the opinion of this Committee there is no impropriety in the lawyer's honoring the order of his client in respect

to the disposition of his client's property. The client has not forfeited all civil rights nor his ownership of property by becoming a fugitive from justice. In the opinion of the Committee it would be improper for the lawyer to disclose the information; his obligation to his client, imposed by our law in the interest of the supposedly proper and satisfactory administration of justice, a rule which is binding upon the lawyer, precludes him from making the disclosure to any one without his client's express consent.

The Committee bases this latter opinion upon its view that the professional relation extends to the date of the communication, notwithstanding the other facts stated in the question.

Question. W., an attorney, obtains a judgment for his client J. in the sum of one hundred and fifty dollars. After taking an inquest, and obtaining an order for the examination of N. the judgment debtor in supplementary proceedings, W. is approached by C., the attorney for N., and is offered the sum of ten dollars as his own fee in this matter, and twenty-five dollars for J. in full settlement for all claims against N. W., after conferring with his client, decided not to accept this offer.

Subsequently C. approaches J. and offers him ten dollars which is accepted in full satisfaction of J.'s claim against N. This is done without consulting or informing W., the attorney for J.

Kindly advise me whether this conduct on the part of C., an attorney, is professional and proper.

Answer. In the opinion of the Committee, the act of C. in approaching W.'s client and settling the proceedings without W.'s knowledge is unethical.

Canon IX of the canons of the American Bar Association reads in part as follows:

"A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with counsel."

Question. Is it proper professional conduct for lawyers, members of a legislature which has passed a law instituting a State Commission authorized to approve and supervise the operations of a certain class of corporations, for the performance for the public of certain acts authorized by the law, to permit such a corporation to advertise for such business and solicit the patronage of the public by announcements stating that such lawyers, designating them by their official titles as members of the Legislature, are their counsel?

Answer. In the opinion of the Committee the conduct suggested is improper; the reference to the position of the counsel as members of the Legislature is too apt to create the impression that that fact gives their client an improper advantage.

Question. Is it proper professional conduct for a lawyer, who is counsel for a public administrator, and who has appeared in behalf of the public administrator to oppose the probate of a will and has been permitted by the court as *amicus curiæ* to propound questions in opposition to the probate, notwithstanding the objection that his client has no standing to make such opposition, and who has by his questions and the answers thereto induced the probate judge to state that he will require further proof to satisfy him that the will should be admitted and will call for the production upon an adjourned date of an earlier testamentary instrument described in the questions, then to seek out the person named as executor in the earlier testamentary instrument executed by the decedent and induce him to offer the earlier instrument for probate and to employ the lawyer as his counsel for the purpose, notwithstanding such executor has previously announced that he was satisfied of the genuineness and validity of the later instrument?

Answer. In the opinion of the Committee the attorney's conduct is improper as stirring up litigation for his own profit, and in view of the capacity in which the lawyer elicited the information it was improper for him to so use it for his own advantage.

Question. A firm of attorneys have from time to time been selected by a collection agency as special counsel in respect to the enforcement of the collection of claims entrusted to it by its patrons; this firm is not the regular counsel for the agency, but is employed occasionally, upon claims and in litigation, when the regular counsel is not engaged. The collection agency, while not undertaking to do or doing any actual legal work, has designated its own employees to examine and prepare accounts and data, to find witnesses, interrogate them, report the facts to said firm, serve summonses and subpoenas, and correspond with its patrons in respect to the facts of the claims and the litigation. The firm has rendered its bills for legal services to the patrons of the agency, but in its care, and has had no communication with the patrons, except through the agency. In view of the fact that the agency through its own employees has lightened the labors of the counsel, they have reduced their bills accordingly, at the instance of the agency, so as to enable this agency to render a bill to its patron for the service actually performed by its own employees, without increasing the amount of the charge to the patron beyond the amount which would be charged by the firm, if it were required to render not only the strictly legal services, but also the incidental services now and heretofore performed by employees of the agency.

Should the firm discontinue its practice of charging less to the patrons of the agency than to its other clients, for whom it necessarily performs the services which in the case of the agency's patrons are performed by the agency?

Answer. In order not to prejudge similar questions which may come before another Committee of this Association, this Committee expresses no opinion as to whether or not the arrangement above described involves the unlawful practice of law by the collection agency. If it does, the lawyer should, of course, not lend himself to the arrangement.

Assuming that the collection agency is not unlawfully practicing law, then in the opinion of the Committee the arrangement described should still be disapproved, because (whatever may be the effect or intent in the present instance), such an arrangement is too apt to facilitate the solicitation of business for attorneys, and the division of a lawyer's fees with a layman. In the opinion of the Committee, such results should be avoided by making the relation of the lawyer to the patron the direct relation of attorney and client, and by making the lawyer's reasonable charge for his services to the client in such manner as to disclose the lawyer's identity and relation and prevent the agency from concealing his charge or covering it in its own charge.

This Committee is also of the opinion that such services as are involved in preparing a litigated case for trial upon the facts should be performed by or under the direction of an attorney who may be held responsible to client and Court according to the measure of a lawyer's responsibility, rather than by, or under the direction of, a lay intermediary which is presumably in the business of soliciting claims that may result in litigation.

Question. A client has newly furnished me with evidence to nullify certain bankruptcy proceedings on account of fraud and collusion between the insolvent and some of his creditors. Other bona fide creditors have come to consult me in regard to this evidence with a view of retaining me in their behalf. The client first above referred to is implicated in the tainted acts alluded to.

1. Assuming that the said client gives his consent, and his legitimate interests are not prejudiced thereby, may I act for the bona fide creditors by using the evidence in their legitimate interests?

2. If not, may I refer said bona fide creditors to some reputable attorney of my acquaintance, with a view of the latter acting in their behalf the same as I would have done if I could properly act in the premises?

Answer. In the opinion of the Committee, in the absence of facts, if any, not disclosed by the question, which might reveal other duties on the part of the attorney, the inquirer may, since his original client consents, with propriety act in behalf of the bona fide creditors. The question discloses no reason why the course suggested in Section 2 of the question should be followed rather than that suggested in Section 1; but if there be any such reason, or if the inquirer prefers, the Committee sees no objection to the inquirer's referring the bona fide creditors to some other reputable attorney, as suggested in Section 2.

Question. Will you please advise us whether the following is a breach of legal ethics:

A and B, copartners, receive a note for $50 from C. The note is drawn in the office of the attorney of A and B, is signed by C in his presence and delivered by the attorney to A and B. The note is not paid at its due date. Subsequently suit is instituted on behalf of A and B by the same attorney in whose office the note is drawn and the suit is brought in a Municipal Court. On the return day of the summons the attorney appears for A and B, answers "action on a promissory note," and there being no answer for the defendant stated "ready for inquest." When the case is called the attorney takes the stand and testifies as to the note.

Answer. In the opinion of the Committee, there is no breach of professional ethics when the attorney for the plaintiff testifies truthfully, of his own knowledge, upon an inquest taken after defendant's default in an action upon a promissory note.

Such a case is not within the reason of the general rule which forbids a lawyer to be counsel and witness in the same case. In the case stated the lawyer's testimony is formal, *ex parte,* and not disputed.

Question. Attorney for plaintiff in an action for divorce in which a judgment dismissing the complaint has been entered, and all costs and fees settled, has among the papers in his files a copy of an answer served in the action making counter-charges against plaintiff (the wife), that answer not being on file for the reason that it was withdrawn and a general denial substituted. Plaintiff demands this copy of the answer containing counter-charges, assigning as a reason that the attorney has permitted its contents to become known to her injury. She threatened to proceed against the attorney and he desires to retain the paper as part of his office record in the action to show the extent and character of his services if they be questioned, and as a matter of fact she has herself submitted the answer in question which also reflects on the attorney to one or more others, and has caused the same to be served on the attorney as part of a set of papers on a motion since abandoned. Should the attorney as a matter of law or ethics surrender the copy of the answer to his former client, or consent to have it destroyed, or is there anything else he should do?

Answer. It appears to the Committee that the dispute involves the question of the legal right to the possession of papers served in an action, and upon that point of law the Committee expresses no opinion. Aside from this there appears to be no principle of professional ethics involved.

Question. The following questions are submitted by a lawyer who, while managing clerk in the employ of another lawyer, learned of the latter's irregularities as specified below. The inquirer has severed his relations with said former employer on account of the said irregularities, but he now inquires whether it is his professional duty to take other steps in respect to the matter, and, if so, what.

(*a*) While in the said employ the inquirer learned by virtue of his employment that his employer, acting in behalf of a plaintiff in a negligence action, had received from a casualty company which appeared for the unsuccessful defendant, a check in full payment of a judgment for damages and costs rendered in behalf of the plaintiff, the employer's client, but the employer (as the inquirer is advised by the plaintiff) has not acquainted the plaintiff with the fact of such payment or accounted to him for the amount thereof, but has falsely informed his client that an appeal from said judgment is pending and has retained the money without the knowledge of the client.

(*b*) The employer was retained to prosecute an action for breach of promise of marriage; the inquirer learned from an affidavit procured by him at his employer's suggestion, detailed facts which if disclosed would demonstrate that the plaintiff has no cause for action, and particularly when the alleged promise was made the plaintiff knew that the defendant was a married man and legally unable to carry out his promise. The employer had full cognizance of the contents of the affidavit, but, nevertheless, directed the inquirer to serve a summons upon the defendant, and the defendant was accordingly served by direction of the inquirer.

(*c*) While in the said employment the inquirer learned of the misapplication by the employer of funds entrusted to him by a client for investment, and the employer falsely represented to his client that the investment had been made as directed and falsely persuaded the client to delay foreclosure on the pretense that the maker of the obligation, in which he falsely pretended to have made the investment, is an honest but poor man.

Answer. This Committee never expresses an opinion as to whether a given state of facts is ground for disciplining an attorney. To do so would trench upon the jurisdiction of another committee of this Association. This Committee therefore treats this question as presenting but one inquiry, viz., whether it is the professional duty of a lawyer to inform against his former employer, also a lawyer, when knowledge of the employer's flagrant wrongdoing has come to the employee in the course of the latter's employment as managing clerk,—that is, in a confidential capacity. In the opinion of the Committee, an employee, being a lawyer, owes a higher duty to his profession at large than to a dishonest employer, and therefore should not only leave the employment, but lay all the facts before the proper committee of a bar association. (See No. 29, Canons of Ethics of the American Bar Association.)

THE MISSOURI MULE.

IN "The Celebrated Mule Case," decided by the Missouri Supreme Court in December, 1914 (171 S. W. 352) Judge Henry Lamm delivered the peroration of his long dissertation on the law in lighter vein "in full blaze." (*Vide* Burke.) Judge Lamm retired from the bench on January 1. Just how much the legal profession, condemned to scan the lengthy and musty opinions of our appellate courts, will miss his sparkling wit and humorous touch is beyond calculation. We can but hope that the need

of the hour will call some one from the ranks to take his place. With this all too inadequate expression of parting regret, let us return to our mule. The case was an action to recover for $5 damage alleged to have been caused by a mule being led along the highway. The plaintiff was successful up to the time of reaching the Supreme Court, but that court thought differently, dismissing the action. Even Judge Graves, writing the principal opinion, lost his judicial poise once or twice in the course of his remarks. It remained, however, for Judge Lamm to seize the unusual opportunity and under the veil of a concurring opinion deliver himself of an immortal epic on the subject at hand. It is good—all good—so good that it would be shameful to mutilate it by selecting extracts therefrom, and consequently we reproduce it in full, as follows:

"It was Dr. Johnson (was it not?) who observed that Oliver Goldsmith had 'contributed to the innocent gayety of mankind.' (Nota bene: If, as a pundit tells me, it was Garrick, and not Goldsmith, Johnson spoke of, and if, in quoting, I misquote, then memory has played a trick upon me, and a learned boy will correct me. Time and weightier matters press me to go on and leave the 'quotation'? stand.) The function of this suit is somewhat the same. Beginning with the 'J. P.'s' it has reached the 'P. J.'s' and in its journey has run the gamut of three courts, one above the other. Now, secundum regulam, it, a fuss over $5, has reached the highest court in the state for final disposition—all this because (1) of divergence of opinion among our learned brethren of the Springfield Court of Appeals, and (2) the provisions of the constitution in that behalf made and provided. However, if the amount at stake is small, the value of the case for doctrine's sake is great.

"As I see it, the case is this: Dale, a man of substance, a farmer, owned a brown and a gray mule, both young and of fine growth; one saddlewise, the other otherwise. Both, used to the plow and wagon, were entitled to the designation 'well broke and gentle.' One Parker was Dale's manservant, and in the usual course of his employment had charge of these mules. On a day certain he had driven them to a water wagon in the humble office of supplying water to a clover huller in the Ozark region hard by its metropolis, to wit, Springfield. Eventide has fallen; i. e., the poetical time of day had come when the beetle wheels his droning flight, drowsy tinkling lulls the distant folds, and all the air a solemn stillness holds. In other words, dropping into the vernacular, it was time to 'take out.' Accordingly, Parker took out with his mind fixed on the watchdog's honest bark baying deep-mouthed welcome as he drew near home; he mounted the ridable mule. He says he tied the other to the hames of the harness on the ridden one by a four or five foot halter rope, and was plodding his weary way homeward à la the plowman in the Elegy. The vicissitudes of the journey in due course brought him to Walnut street in said city of Springfield. At a certain place in that street the city fathers had broken the pavement and made a 'rick of brick' aside a long hole or ditch. Hard by this rick of brick was a ridge of fresh earth capped by a display of red lantern danger signals. It seems the unridden mule crowded against the ridden one and harassed Parker by coming in scraping contact with his circumjacent leg. Any boy who ever rode the lead horse in harrowing his father's field will get the idea. In this pickle he took hold of the halter rope, still fastened to the hames, to keep the unridden mule from rasping his said leg. It might be well to say at this point that witnesses for the plaintiff did not observe that the end of the rope was attached to the hames of the ridden mule. As they saw it, Parker was leading the mule. As will be seen a bit further on, at this point a grave question arises, to wit: Is it negligence to lead a mule by hand, or should he be fastened 'neck and neck' to his fellow? But we anticipate.

"Going back a little, it seems as follows: At about the time Parker had reached said part of Walnut street, plaintiff and two others were in a buggy pulled by a single horse and on their way home to the country. So equipped, these several parties met face to face. At this point it will do to say that, while the mules were used to being on the water wagon, it is not so clear that these travelers three were. There are signs of that artificial elation in the vehicle party that in the evening springs from drinking ('breathing freely'), but on the morning after produces the condition of involuntary expiation Dr. Von Ihring calls 'katzenjammer.' They disavow being half seas over or drunk. Their chief spokesman, as descriptive of the situation, in part told his story mathematically in this fashion:

"'I had not drank so much but what I kept count. I can keep count until I take three, and hadn't quit counting yet. . . .'

"In the course of their journey they, too, came to the brick rick, the ditch, the ridge of dirt, and the red lights on Walnut street. There they met, as said, the gray and brown mule and Parker face to face. When mules and rider approached and passed the three travelers, all on the same side of the ditch, the led mule (whether scared by the hole in the ground, the rick of brick, or the ridge is dark) shied from his fellow ('spread' himself), and presently his hind leg was mixed up with the shafts and wheel of the buggy. When the status quo ante was re-established, both leg and wheel were found damaged. Subsequently a blacksmith offered to repair the damages to the wheel for, say, a dollar and a half. This sum defendant, though denying liability, was willing and offered to pay; but plaintiff's dander was up, and he, as buggy owner, demanded a new wheel worth $5 and sued. In the justice court defendant lost outright and appealed. In the circuit court the same. The learned judges of the court of appeals could not agree (the furor scribendi being much in evidence, and three learned opinions falling from their several pens) and sent the case here—and here it is.

"My Brother Graves has well disposed of it on certain grounds, but the theme being the Missouri mule, and state pride calling for further exposition, the said furor scribendi has seized me—witness:

"(*a*) It is argued that it was negligence to ride one mule and lead its fellow by hand. That they should be halter-yoked 'neck and neck.' Parker says he necked them in a way, but plaintiff takes issue on the fact. Allowing credit to plaintiff's evidence, two questions spring, viz.: First. Is the neck-and-neck theory 'mule law' in this jurisdiction? Second. If so, then was the absence of the neck-and-neck adjustment the proximate cause of the injury? We may let the first question be settled in some other mule case and pass to the second as more important. It will be observed that the neck and forequarters of the mule did not do the damage. Contra, the hindquarters or 'business end' of the mule were in fault. We take judicial notice of facts of nature. Hence we know that haltering a mule neck and neck to another will not prevent his hind parts spreading. His neck might be on one line, but his hind legs and heels might be on another—a divergent one. True, the mental concept relating to shying or spreading would naturally originate in the mule's head. But it must be allowed as a sound psychological proposition that haltering his head or neck can in no wise control the mule's thoughts or control the hinder parts affected by those thoughts. So much, I think, is clear and is due to be said of the Missouri mule whose bones, in attestation of his activity and worth, lie bleaching from Shiloh to Spion Kop, from San Juan to Przemysl (pronounced, I am told by a scholar, as it is spelled). It results

that the causal connection between the negligence in hand and the injury is broken, and recovery cannot go on the neck-and-neck theory. This because it is plain, under the distances disclosed by the evidence, that the mule's hind legs could reach the buggy wheel in spite of a neck-and-neck attachment.

"(*b*) The next question is a bit elusive, but seems lodged in the case. It runs thus: There being no evidence tending to show the mule was 'wild and unruly' as charged, is such a mule per se a nuisance, a vicious animal, has he a heart devoid of social duty and fatally bent on mischief when led by a halter on the street of a town, and must his owner answer for his acts on that theory? Attend to that view of it:

"(1) There are sporadic instances of mules behaving badly. That one that Absalom rode and 'went from under' him at a crisis in his fate, for instance. So it has been intimated in fireside precepts that the mule is unexpected in his heel action, and has other faults. In Spanish folk lore it is said: He who wants a mule without fault must walk. So at the French chimney corner the adage runs: The mule long keeps a kick in reserve for his master. 'The mule don't kick according to no rule,' saith the American Negro. His voice has been a matter of derision, and there be those who put their tongue in their cheek when speaking of it. Witness the German proverb: Mules make a great fuss about their ancestors having been asses. And so on, and so on. But none of these things are factors in the instant case, for here there was no kicking and no braying standing in the relation of causa causans to the injury to the wheel. Moreover the rule of logic is that induction which proceeds by merely citing instances is a childish affair, and, being without any certain principle of inference, it may be overthrown by contrary instances. Accordingly the faithfulness, the dependableness, the surefootedness, the endurance, the strength, and the good sense of the mule (all matters of common knowledge) may be allowed to stand over against his faults and create either an equilibrium or a preponderance in the scales in his favor. He then, as a domestic animal, is entitled to the doctrine that, if he become vicious, guilty knowledge (the scienter) must be brought home to his master, precisely as it must be on the dog or ox. The rule of the master's liability for acts of the ox is old. Ex. xxi. 29. That for the acts of the dog is put this way: The law allows the dog his first bite. Lord Cockburn's dictum covers the master's liability on a kindred phase of liability for sheep killing, to wit: Every dog is entitled to at least one worry. So with this mule. Absent proof of the bad habit of 'spreading' when led and the scienter, liability did not spring from the mere fact his hind leg (he being scared) got over the wheel while he was led by a five-foot halter rope, for it must be held that a led mule is not a nuisance per se, unless he is to be condemned on that score out and out because of his ancestry and some law of heredity, some asinine rule, so to speak—a question we take next.

"(2) Some care should be taken not to allow such scornful remarks as that 'the mule has no pride of ancestry or hope of posterity' to press upon our judgment. He inherits his father's ears; but what of that? The asses' ears, presented by an angry Apollo, were an affliction to King Midas, but not to the mule. He is a hybrid, but that was man's intention centuries gone in some province of Asia Minor, and the fact is not chargeable to the mule. So the slowness of the domestic ass does not descend as a trait to the Missouri mule. It is said that a thistle is a fat salad for an ass's mouth. Maybe it is also to the mule's, but, be it so, surely his penchant for homely fare cannot so far condemn him that he does not stand rectus in curia. Moreover, if his sire stands in satire as an emblem of sleepy stupidity, yet that avails nought, for the authorities (on which I cannot put my finger at this moment) agree that the Missouri mule takes after his dam and not his sire in that regard. All asses are not fourfooted, the adage saith, and yet to call a man an 'ass' is quite a different thing than to call him 'mulish.' Vide the lexicographers.

"Furthermore, the very word 'jackass' is a term of reproach everywhere, as in the literature of the law. Do we not all know that a certain phase of the law of negligence, the humanitarian rule, first announced, it has been said, in a donkey case (*Davis* v. *Mann*, 10 Mees. & W. 545) has been called, by those who deride it, the 'jackass doctrine'? This on the doctrine of the adage: Call a dog a bad name and then hang him. But, on the other hand, to sum up fairly, it was an ass that saw the heavenly vision even Balaam, the seer, could not see and first raised a voice against cruelty to animals. Num. xxii. 28 et seq. So, did not Sancho Panza by meditation gather the sparks of wisdom while ambling along on the back of one, that radiated in his wonderful judgments pronounced in his decision by the common-sense rule of knotty cases in the Island of Barataria? Did not Samson use the jawbone of one effectually on a thousand Philistines? Is not his name imperishably preserved in that of the fifth proposition of the first book of Euclid—the pons asinorum? But we shall pursue the subject no farther. Enough has been said to show that the ass is not without some rights in the courts even on sentimental grounds; ergo if his hybrid son, tracing his lineage as he does to the Jacks of Kentucky and Andalusia, inherits some of his traits, he cannot be held bad per se. Q. E. D.

"It is meet that a $5 case, having its tap root in anger (and possibly in liquor), should not drag its slow lengths through the courts for more than five years, even if it has earned the soubriquet of 'the celebrated mule case.'

"The premises herein and in the opinion of Brother Graves all in mind, I concur."

POINTS FROM THE ADDRESS OF HON. WILLIAM H. TAFT AT THE MEETING OF THE AMERICAN BAR ASSOCIATION.

Impartial attitude enjoined with reference to European war.

MOST of us do not understand how much significance European peoples give to hostile expressions of our press and of prominent men, which they are quite inclined to regard as either inspired or at least acquiesced in by our government and as embodying the views of the entire people. They do not appreciate the comparatively little weight in judging our national attitude that ought to be given to editorial expressions, or hastily prepared communications, based on current reports necessarily inaccurate or biased. The language of the President, in which he declined to be drawn into a decision or the expression of an opinion on the complaints of belligerents, was most admirable and showed to the world what we must show, that we do not intend to be drawn into this controversy in any way; that while we are willing to assist as much as possible in bringing about peace, our attitude as judges cannot be invoked until we are given formal authority, with a stipulated condition to abide the judgment.

We are the principal nation of the Christian world not so related to the struggle that both sides may really regard us as disinterested friends. It is our highest duty, and the President makes plain his earnest appreciation of this, not to sacrifice and destroy this great leverage for successful mediation when the opportunity arises, by ill-advised and premature judgment upon the merits. The sensitiveness of the struggling participants to every view friendly or hostile is most acute. Many of

us can remember how we felt when similarly placed. We must hold our tongues to be useful to mankind.

Treaty rights of aliens.

We have made many treaties of friendship and peace—indeed treaties with all the world—in which we have assured to aliens, subjects, or citizens of the other party to the treaty resident within our borders due process of law in protection of life, liberty and property. Nevertheless, we now withhold from the same authority that makes the treaty the power to fulfill its obligation. A statute of a dozen lines would put it in the power of the President to institute judicial proceedings, civil and criminal, in courts of the United States, to punish a violation of the treaty rights of aliens, and enable him to use the civil and military executive arm of the government to protect against their threatened invasion. In our past experience we must realize that mob violence committed through race prejudice against aliens will never be punished by state authority, and there is nothing that a high-strung people—and it is peoples now who largely control the matter of war and peace—resent so much as the mistreatment of their fellow-countrymen living under the flag of a foreign government which has stipulated and pledged its honor to give them protection. The real opposition to this reform finds its source in the factional determination of people in localities to exclude lawful immigrants. They look to illegal force to maintain their purpose, and they fear the effectiveness of the national arm in restraining it.

It is idle to urge that the granting of such a power to the Executive is contrary to the Constitution, because the Supreme Court has already said specifically that Congress has the authority. It is true that a majority of a committee of this association twenty years ago reported that the existence of this power was doubtful, but I venture to think that no committee could be appointed to-day from the association that would make such a report. I hope that this question will be referred at this annual meeting to the proper committee for another consideration of it, a report as to the needed legislation, and a vote by the association in favor of its enactment.

Noteworthy national legislation.

The most noteworthy national legislation of the year, from the standpoint of the administration of justice, is contained in the Trade Commission Act and the so-called Clayton Act. Together they affect two general subjects matter. They supplement existing statutes and general law as to illegal trusts and monopolies in interstate commerce, and they deal with the application of the anti-trust act to labor associations, the issuing of injunctions in labor disputes in federal courts, and the procedure for the punishment of contempts in a certain class of cases.

Both measures in the most painstaking way make clear that nothing in them is to vary the meaning of the three important sections of the Sherman Act which have been so fully considered and clearly construed by the Supreme Court in the light of, and by the rule of, reason. We may, therefore, in beginning the consideration of this new legislation, rejoice that in spite of the exuberant criticism of the Supreme Court decisions in the Standard Oil and Tobacco cases when announced, and the threats of legislation to dethrone reason in judicial construction as applied to the anti-trust laws, we may still use in a normal way those mental processes with which nature has endowed us in attempting to find out what Congress means in these new acts.

The first part of this legislation adds new and elaborate machinery for the enforcement of the anti-trust acts. Second, it appears to create new offenses in that field of the law. Third, it imposes, after two years, certain restrictions upon what have been called interlocking directorates in banks and railroads, evidently with a view to prevent temptation to, and opportunity for, a suppression of competition and monopoly. Fourth, it brings into the federal criminal jurisdiction embezzlements and other breaches of trust by directors, officers and agents of interstate carriers, and provides other restrictions to secure their fidelity.

An analogy more or less complete is established between the regulation of common carriers under the interstate commerce law and that of industrial concerns engaged in interstate trade. As the commerce law declares undue discrimination and unreasonable rates unlawful, so this trade law declares "unfair methods of competition" unlawful. As the former creates a commission to determine what rates are unduly discriminating or unreasonable, so the latter creates one to determine what are unfair methods of competition. Similar process and hearings are provided in case of probable violations of the law upon the complaint of anyone, or of the commission's own motion. Equally inquisitorial powers are conferred on the two commissions. The Trade Commission is to find the facts after any hearing; and, if sufficient, make an order against the defendant, to be enforced in case of refusal by application to the Court of Appeals of the proper circuit. The court is to take the finding of fact as conclusive, if based on any evidence, to decide the questions of law, and reverse, modify, or affirm the order; and, if sustaining it in any part, to enforce it. The commission is to act as Master in Chancery in assisting the court in formulating orders and decrees for the proper adjustment of the affairs of a corporation found guilty of violating the anti-trust law, and, in general, it takes over the investigating and statistical duties of the Bureau of Corporations.

In so far as the field of general interstate trade is within the practical range of supervision and regulation, the machinery here adopted, it seems to me, is as effective as any could be. The question whether the existing anti-trust law, with its twenty years of construction by the Supreme Court, was not sufficient, and the economic policy of adopting this close supervision and these inquisitorial methods in general business not charged with a public use, it is not my purpose here to discuss. I am only now concerned with the meaning of the new law and its effect upon the declaration of substantive law in the anti-trust acts.

Meaning of "unfair methods of competition."

The first new term that confronts us in the Trade Commission Act is "unfair methods of competition." What does it mean? It does not appear in the Clayton Act at all, and yet the two acts are *in pari materia.*

It is hard to reach any other conclusion, after consideration of the old legislation and the new, than that unfair methods of competition thus denounced only include those methods and practices in interstate trade the effect and intent of which would bring them within the scope and condemnation of the first, second and third sections of the Sherman Act. The same thing is true of several specific offenses denounced in Secs. 2, 3 and 7 of the Clayton Act. These are:

1. Discriminations in price as between purchasers in sale of goods;

2. A sale or lease of goods patented or unpatented on condition that the vendee shall not deal in or use the goods of a competitor;

3. Acquisition of stock by one trading corporation in another;

4. Acquisition of stock by one corporation in two other trading corporations;

when the effect of any one of these four acts may be substantially to lessen competition, restrain interstate commerce, or tend to create monopoly.

The words "with the effect substantially to lessen competition" are to be construed in the light of their association with the words that follow them in order to secure some guide to the meaning of "substantially." It certainly does not mean any lessening of competition, however small, because its ordinary signification prevents that. More than that, the union of two trading corporations by a holding company or otherwise must always lessen competition somewhat. The only reasonable solution would seem to be to hold that it means such substantial suppression of competition as to constitute a real restraint of trade and a tendency to monopolize. Now it is possible to point out decisions of the Supreme Court on the anti-trust law in which each act here specifically denounced is held to be within the Sherman law. The condemnation of the so-called tying provision in the sale of patented articles is the only one of the acts described that can be regarded as a slight widening of the effect of that law. It may lessen somewhat the scope of the legal monopoly under the patent law as declared by the Supreme Court. With this small possible exception, however, so far as I can see, the field of illegal and criminal effort in respect to restraints of interstate commerce or monopolies of it is not enlarged under the new acts. Indeed, it is difficult to see how it could be in view of the sweeping language of Chief Justice White in construing the Sherman law in the Standard Oil and Tobacco cases. These three sections, therefore, merely specify certain phases of violations of the Sherman law which can be prosecuted under separate indictments.

Combinations.

In the last quarter of a century we have witnessed the enormous growth of power in bodies of men, secured by the combinations of capital on the one hand and of labor on the other. The necessity for the combination of capital, in order to increase the effectiveness of production and manufacture and to reduce its cost, has been fully recognized by all persons at all familiar with business conditions and economic principles. The equal necessity for the combination of labor, in order to exact from capital its fair share of the value of the joint product, consistent with the normal operation of economic law, has also been recognized by sane students of economic and social science. The enormous power which these combinations have, has proved to be subject to great abuses.

The combinations of capital too frequently strengthen their control by the use of money in politics and through the instrumentality of the political boss and the machine. After the country had sobered down from the intoxication of its enormous business expansion and prosperity, the scales fell from the eyes of the people, they saw the danger of plutocracy, and throughout the length and breadth of the land they attempted, by their representatives in the legislatures and in Congress, to curb this power of combined capital and to restrain it within legitimate limits; and so we had the interstate commerce law, the anti-trust law, and the amendments to those laws, and the struggle in the courts, until now both laws have received authoritative construction and have become reasonably effective for the purpose for which they were enacted.

But the momentum that such a popular movement acquires prevents its stopping at the median line, and we are in danger of excessive regulation which will really interfere with that freedom of trade and unrestricted initiative which has helped so much the material progress of the country heretofore. Party leaders and parties, in the imaginative and efflorescent style of party platforms and stump deliverances, have denounced the slow judicial process of remedying evils and establishing justice, and have called for cross-cut methods, direct and summary remedies, and the suppression of evil and the upholding of the good by executive action in which those acting were not to be bothered by precedent, but were to decide everything upon the merits of the particular case. Legislatures have sought to meet this demand by creating commissions with large powers to enforce laws. In so far as these commissions have rendered more effective the exercise of what is really an executive function, they have been good things, and often they have relieved courts of quasi-executive duties that have not only burdened the courts, but also exposed them to unnecessary prejudice and attack, because the matters acted on had a political, economic, or social phase. Many have been disposed to view this delegation of powers to commissions as derogating from the authority of courts and as tending to deprive the citizen of a real judicial hearing in defense of his right to liberty and property and the pursuit of happiness. Whatever the early effect, I do not think we need fear such an ultimate result. The national spirit engendered in every one who has blended with all his conceptions of social and political life the principles of Anglo-Saxon justice will prompt limitations in such legislative enactments and in rules of practice for their execution, and preserve the same due process of law for the party litigant that the barons at Runnymede wrested from King John for the freemen of England. The eminently judicial Court of Chancery was evolved from the wide, unlimited, and apparently arbitrary discretion that the King vested in his chancellor to remedy individual instances of injustice done by the King's own courts of common law. The natural conservative tendency even of radical reformers when confronted with the difficult duty of drafting practical legislation is well illustrated in the provisions of these two statutes, which are far less drastic and revolutionary than we had been led to expect when there was so much thundering in the index.

Cases of Interest.

LIABILITY OF PERSON CONDUCTING AGRICULTURAL FAIR FOR INJURY TO PATRON.—In Graffam *v.* Saco Grange (Me.) 92 Atl. 649, it was held that the defendant, which conducted an agricultural fair, was liable for the death of a boy, killed through the negligent handling of a rifle by one in charge of a shooting gallery licensed by defendant. The court applied the rule that where the owner or purchaser of land invites the public on its premises to attend an entertainment therein given, it is bound not only to protect the public from dangers from those portions of the premises under its direct control, but from dangers incident to concessions managed by others.

REMOVAL BY MUNICIPALITY OF LATERAL SUPPORT IN GRADING NEW STREET AS ENTITLING ABUTTING OWNER TO DAMAGES.—Schuss *v.* City of Chehalis, (Wash.) 144 Pac. 916, lays down the rule that there can be no recovery for the removal of lateral support by a city in making an original grade, where the grading is done wholly within the limits of the street, in the absence of evidence tending to show that the city was negligent in the prosecution of the work. This rule is grounded upon the principle that, in dedicating a street, the dedicator impliedly grants the right to grade it so as to make it usable, and so as to make the surrounding property accessible.

VALIDITY OF STATUTE FORBIDDING SALE OF LIQUOR TO STUDENTS.—That a statute is valid which forbids the sale of liquor to any student in attendance at any public or private institution of learning in the state is the holding of the court in People *v.* Damm, (Mich.) 149 N. W. 1002, wherein the defendant, an Ann Arbor liquor dealer, was convicted of selling liquor to students in attendance at the University of Michigan. The court in affirming the judgment of conviction said: "It is said, in argument, and is true, that the effect of the legislation is to deny to adult students privileges enjoyed by other adult citizens, and to deny them during the school year rights and privileges which they may enjoy during vacation. So citizens living in a local option county may be, in the same way, stripped of privileges which are enjoyed by their neighbors in an adjoining county. A law which makes it improbable, if not impossible, that students shall patronize drinking places, is not so clearly beyond the police power that the courts may declare it invalid."

"MOB" AS INCLUDING PRISONERS WHO JOIN TOGETHER IN WHIPPING ANOTHER PRISONER.—In Blakeman *v.* City of Wichita (Kan.) 144 Pac. 816, a large number of persons confined together in a city jail, who joined together to whip another prisoner, and who did severely whip and injure him, were held to be a "mob" or "riotous assemblage," within the meaning of a statute making cities liable for damages resulting from mob violence. The court gave the reasons for the decision as follows: "It appears that the assemblage which inflicted the injury upon the plaintiff has all the elements of a mob, unless the fact that the riotous crowd was within the prison when the unlawful purpose was formed and executed is material. No reason is seen why a mob may not be organized and carry out its unlawful purpose inside as well as outside a building or inclosure. The circumstance that the persons did not voluntarily come into the jail and did not originally assemble there to whip the plaintiff does not put them outside the definition of a mob. The manner of their coming together or the primary purpose for which they assembled is not material if they, in fact, formed the unlawful purpose and became riotous after they were brought together."

DRIVING ON HIGHWAY MULE WHICH WAS LIABLE TO BE FRIGHTENED AT AUTOMOBILE AS CONTRIBUTORY NEGLIGENCE.—In Butler *v.* Cabe, (Ark.) 171 S. W. 1190, a judgment for the defendant in an action brought to recover damages to a buggy and harness caused by the alleged negligence of the defendant in so operating an automobile on a highway as to frighten the plaintiff's mule which thereupon ran away, was reversed because of an instruction which in effect told the jury that the plaintiff was not entitled to recover for an injury caused by his team becoming frightened at the approach of an automobile and running away and injuring him, if he knew that the animal was liable to become frightened upon meeting an automobile, and a prudent person would not have driven an animal of that kind upon the public highway where automobiles might be met. In reversing the judgment the court said: "This is not the law. Plaintiff had the right to drive his mule on the public highway, being bound, of course, to the exercise of ordinary care while doing so, and there was no reason to think that he could or would not have time upon the approach of an automobile to take such measures as would protect himself from danger on account of the fright of the animal by either leaving the road if opportunity offered, or by getting out of the buggy and holding the animal until the danger was past."

RIGHT OF AGENT EMPLOYED TO SELL PROPERTY TO SELL TO HIMSELF.—As a general proposition it is of course well settled that an agent employed to sell property may not sell to himself. But in Hutton *v.* Sherrard, (Mich.) 150 N. W. 135, such a sale was held proper on the peculiar facts of the case, it appearing that the agent was authorized to sell property at a minimum price to the principal, the agent to be entitled to whatever was obtained for the property above that price. The court said: "It is a general rule of law that an agent for the selling of property may not sell it to himself. . . . The reason why public policy has so decreed is to prevent the selfish interest of the agent from coming in contact with his duty to his principal. In all transactions where the agent's loyalty is liable to be affected by his selfish interest, the general rule will apply even though no fraud is practiced. . . . Measured by this test, is the transaction before us one to which the rule should be applied? The minimum price fixed in the contract belongs to the principal. If a sale is made, the principal is entitled to the minimum sum, plus the cost of the sidewalk, and nothing more. The agent's diligence in securing the best price obtainable therefor is no benefit to defendants beyond the minimum price. Whether a lot sells for $1 or $100 in excess of the minimum price, the result is the same to the principal; he neither gains nor loses by the transaction. This differs widely from a contract which fixes a minimum selling price and a percentage commission. In such a case the principal profits by any price in excess of the minimum, whereas, in the case before us, he profits nothing beyond the minimum price."

"BITE" OF ANGORA CAT AS GROUND FOR RECOVERY OF DAMAGES.—The case of Bischoff *v.* Cheney, (Conn.) 92 Atl. 660, holds that the fact that an Angora cat strays onto the premises of one not its owner and bites the occupant does not entitle the one receiving the bite to damages for the injury sustained, in an action against the owner of the cat, there being no evidence that the cat was known by its owner to be vicious. The opinion of the court in this case is instructive on the question of the duty towards his neighbors of one owning a cat. A good summary of his duty is contained in the following passage: "The cat is not a species of domestic animals naturally inclined to mischief, such as, for example, cattle, whose instinct is to rove, and whose practice is to eat and trample growing crops. The cat's disposition is kindly and docile, and by nature it is one of the most tame and harmless of all domestic animals. The practical impossibility of preventing trespassing unless it be confined as would be an animal feræ naturæ, the infrequency of damage from their wandering and the freedom to roam permitted them by all, makes especially reasonable the rule that no negligence can be attributed to the mere trespass of a cat which has neither mischievous nor vicious propensities, and consequently no liability attaches for such trespasses, since an owner cannot be compelled to anticipate and guard against the unknown and unusual. If, however, the cat be of a species having, or in fact of, a mischievous or vicious disposition, and its owner knows this propensity, and then permits the cat to go at large or trespass, he will be liable for the damage done by it resulting from the trespass. His liability arises from his negligence in permitting the cat of this known disposition to trespass or be at large and in his violation of his duty to use reasonable care to restrain the cat."

RIGHT OF PARTY TO IMPEACH OWN WITNESS.—In People *v.* De Martini, (N. Y.) 107 N. E. 506, which was an appeal from a judgment convicting the defendant of murder, the judgment was reversed because the prosecuting attorney was allowed to impeach witnesses who testified for the people. An effort was made to have the court of appeals adopt a new rule with regard to the impeaching of one's own witness, but this the court refused to do. Werner, J., wrote the opinion of the court, which reads in part as follows: "Probably no rule of evidence is more generally familiar than the rule that a party may not impeach his

own witness, and yet there is none that has caused greater confusion in practice. Like many another common-law rule, its genesis is lost in antiquity and the reason for its existence is largely a matter of philosophical speculation. Prof. Wigmore, with his characteristic ability and thoroughness, has traced its origin to the primitive times when there were no witnesses in the modern acceptation of the term, but 'oath helpers' by whose mere oath the issue of the cause was determined, without regard to anything like testimonial support. From that early time its development is largely a matter of tradition until, as Wigmore says, it began to make its occasional appearance as a general working rule in the early part of the eighteenth century, and toward the end of that century it gained general currency by its application in the trial of Warren Hastings. Since that time its existence has been unquestioned, although in a number of jurisdictions it has been abrogated by statute, as in England, Massachusetts, Indiana, Georgia, Kentucky, Texas, and perhaps others. In the effort to apply this rule to an infinite variety of circumstances and conditions, we have reaped the usual harvest of conflicting decisions, and the confusion thus created seems to have been augmented by the attempts of the text-writers to bring a semblance of order out of chaos. Wigmore boldly expresses the view that there never was any sound reason for the rule, and that, even if there had been, it is no longer to be tolerated as an impediment to the ascertainment of truth by the most direct and certain methods. There is much to be said in support of Prof. Wigmore's argument, as will be seen by reference to chapter 29 of his work; but the case at bar is not one in which we should make a new departure, for a human life is at stake. In such a case we should not change a rule of evidence for the purpose of upholding a conviction that cannot be sustained under our own established decisions."

DUTY OF MAN ASSAILED IN HIS OWN DWELLING TO RETREAT.—An interesting discussion of the duty of a man assailed in his own dwelling to retreat is found in the late case of People *v.* Tomlins, (N. Y.) 107 N. E. 496. The facts showed that the defendant shot and killed his son, a young man of 22. The shooting took place in the little cottage where the son had been born and reared. On the trial, the father maintained that he had acted without premeditation, when blinded by passion because of blows and insults. He maintained also that he had acted justifiably, in lawful self-defense. The jury were instructed that homicide in self-defense is not justifiable unless there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer, and unless also there is reasonable ground to apprehend that the danger is imminent. These instructions were coupled, however, with a statement that it was the defendant's duty, if possible, to retreat and escape. "A man," said the court, "has no right to resort to force and violence against another, even where the danger is imminent, even where he has reasonable cause to believe that he is in danger, unless he has no reasonably safe means of escape and retreat. . . . To justify this defendant, applying the law to this case, in shooting his son, or shooting at him, or using any force against him, he must have had reasonable cause for believing, not that the boy some time in the future might do something against him, but he must have had reasonable cause for believing that the boy right then, when he came down those stairs and landed on the kitchen floor, was about to attack him. Even then he would have had no right to use a weapon, or any other force, if he could have gotten away from danger by retreating; if he could have gotten off the porch, and gone across the lot, and down the road, or around the house, or anywhere, to a place of safety, then the law says that he should have done so, and that he had no right to use the weapon against his son, unless all reasonable means of retreating were cut off, and the boy was threatening him with bodily injury, or putting his life in danger." There was a judgment of conviction which was reversed by the court of appeals on the ground that the instructions given the jury were erroneous as applied to the facts in the case. Cardozo, J., speaking for the court of appeals, said: "The homicide occurred in the defendant's dwelling. It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways a fugitive from his own home. More than two hundred years ago it was said by Lord Chief Justice Hale (1 Hale's Pleas of the Crown, 486): In case a man 'is assailed in his own house, he need not flee as far as he can, as in other cases of se defendendo, for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight.' Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States as in England."

LIABILITY OF MASTER FOR DEATH OF SERVANT CAUSED BY FAILURE TO FURNISH MEDICAL AID.—A somewhat novel case is that of Hunicke *v.* Meramec Quarry Co., (Mo.) 172 S. W. 43, wherein it was held that a master was liable for the death of a servant caused by his negligence in failing to procure a physician or surgeon to attend and treat the servant who had received a severe personal injury, the result being that the servant bled to death for lack of medical aid. Commenting on the master's duty the court used language as follows: "In my opinion there is no possibility of doubt but what the law is that whenever one person employs another to perform dangerous work, and that, while performing that work, he is so badly injured as to incapacitate him from caring for himself, then the duty of providing medical treatment for him is devolved upon the employer; and that duty, in my opinion, grows out of the fact that, when we get down to the real facts in all such cases, there is an unexpressed humane and natural understanding existing between them to the effect that, whenever any one in such a case is so injured that he cannot care for himself, then the employer will furnish him medical or surgical treatment, as the case may be. This is common knowledge. There is not an industrial institution in this country, great or small, where that practice is not being carried on to-day; and that has been the custom and usage among men from the dawn of civilization down to the present day, and will continue to be practiced in the future, just as long as the human heart beats in sympathy for the unfortunate and desires to aid suffering humanity. The same principle underlies all other avocations of life. Even armies, while engaged in actual warfare, observe and obey this rule when possible. The soldier who refuses to render surgical or medical aid to the victim of his own sword is eschewed by all decent men, while, upon the other hand, all who administer to the wants and necessities of the sick and wounded are considered as God's noblemen and as princes among men. So universally true and deep-seated is this humane feeling among men, and so universally recognized and practiced among them, that it has become a world-wide rule of moral conduct among men, brothers, friends, and foes; and it says to one and all: You must exercise all reasonable efforts and means at hand to alleviate the pain and suffering and save the lives and limbs of those who have been stricken in your presence. For the violation of this rule of moral conduct there is no penalty attached, save the condemnation of God and the scorn of all

good men and women. But, seeing the wisdom, goodness, and justice of this moral law, the law of the land laid its strong hand upon it, the same as it did upon many other good and useful customs of England, and breathed into them a living rule of legal conduct among men. It says unto all who employ labor that, because of this universally practiced custom of men to furnish medical or surgical aid for those who are stricken in their presence, you must furnish the employee with such services when he is so badly injured that he is incapacitated from caring for himself. This is but the application or extension of the common-law rule which requires the master to furnish his servant with a safe place in which to work, and safe instrumentalities with which to perform that labor. That law grew out of the old customs and usages of the English people of furnishing their servants with a safe place in which to work and safe instrumentalities with which to labor. So universally true was that custom that the law read into all contracts of labor an implied promise on the part of the master to furnish those safeguards to his servants. There is no statutory or written law upon the subject. It is simply what is called the unwritten or common law of England, which has been adopted by statutes in this and many other states of the Union."

New Books.

A Treatise on the Law of Income Taxation under Federal and State Laws. By Henry Campbell Black. Second Edition. Vernon Law Book Company. Kansas City, Mo. 1915.

In 1913 the first edition of Mr. Black's work on Income Taxes was published, and in the short time that has intervened since then the law on the subject has developed so rapidly that a second edition of the book has been found necessary. The present edition contains so much new matter, and there have been so many changes made in the treatment of the old material, that it is bound to supplant the original edition which proved very serviceable. Mr. Black has in the new edition made a new arrangement of the material that should make reference very easy. His explanation of this arrangement and the reason for making it is as follows: "It is the experience of all those who have had much to do with the subject that the act of Congress is not only singularly infelicitous in its language, but singularly confused in its arrangement. To begin with, the whole of the statute, in so far as it relates to income taxes, constitutes one single section of the tariff act of 1913. In the next place, it is not otherwise divided than into a small number of lettered paragraphs, some of which are of inordinate length and embrace a considerable number of more or less unrelated provisions. Next, it is impossible to proceed safely in the study of any provision of the statute without constantly referring to the great mass of rulings and regulations of the Bureau of Internal Revenue, to discover how the provision is interpreted by the Bureau, or what provision has been made for carrying it into effect. To lessen the formidable labor of such a search through the act and the regulations, the author has in this book adopted the device of breaking up the statute into seventy sections, numbered consecutively, and each introduced by a black-letter headline descriptive of its contents. This has been done without altering a jot or tittle of the statute, the reprint of which is textually correct, or even disturbing the original arrangement of its parts. But it is thought that the plan will materially facilitate reference to the various clauses of the act. These seventy sections now constitute the first chapter of the book. In the second chapter, the Treasury regulations and decisions have been treated according to the same plan. These have been arranged in one hundred and six numbered sections (sections 71 to 176 inclusive), with descriptive headlines. Further, a system of cross-references has been provided, linking together the text of the statute, the departmental regulations, and the detailed treatment of the subject in the body of the book, so that there should be no difficulty in discovering all that Congress, the department, and the courts have had to say on any given point or problem. And further to promote the convenience of the reader, the general index to the volume has been made as copious and complete as the author's industry and experience could make it." The third chapter contains the United States Internal Revenue Regulations No. 33. Subsequent chapters contain a detailed consideration of the various statutory provisions of the Income Tax law read in the light of the court decisions and official rulings. There is an appendix giving the text of state income tax laws and early federal acts, also the United States Corporation Excise Tax Law of 1909. There is, moreover, a collection of all forms officially prescribed by the Treasury Department. There are over eight hundred pages in the volume. Mr. Black's standing as a legal author justifies the belief that the profession will take very kindly to this latest product of his pen, especially since it deals with the construction of an act which is of vast importance to many thousands of people and is as yet little understood.

Essentials of the Law. A Review of Blackstone's Commentaries. Second Edition. By Marshall D. Ewell, LL.D., late President and Dean of the Kent College of Law of Chicago. Matthew Bender & Company, Albany, N. Y. 1915.

Ewell's "Essentials of the Law" has for years been a standard work for law students. It contains two volumes, the first of which is an abridgment of Blackstone's Commentaries, and the second a treatise entitled "Elementary Law." The volume before us is a second edition of the abridgment. The first edition was published in 1882 at a time when the author was teaching elementary law in the Union College of Law of Chicago, and was instructing classes in the Commentaries. It was heartily received by the student body throughout the United States, and has been a first aid to thousands of beginners in the study of the law. Relative to the volume at hand Mr. Ewell says: "In making this revision the distinguishing features of the text have been retained. In addition thereto, since the writer no longer appears in person before classes of students with oral explanations, it has been thought advisable to supplement the text with explanatory notes, not merely for the purpose of fortifying the text by authority, but to take the place as far as possible of the former oral expositions and thus make the text more understandable. At the same time references have been made to such text books and leading cases as seemed best adapted to develop and amplify the text. As the book is primarily intended for students, it has not been loaded down with cases, though it is believed that a reference to the elementary principles contained in this series with the authors and cases supporting them will be advantageous to every one interested in the study or practice of law. In the text, notes, and interpolated books and chapters written by the author, will, it is believed, be found a comprehensive though brief review of the whole body of English and American customary law, including statutes which by reason of their all but universal adoption have become a part of the general law of the land. To make these separate books and chapters exhaustive would require a library; but enough has been given to give a general though brief review of the subjects treated; and the student is referred to more exhaustive treatises for further explanations." Mr. Ewell's labors have produced a book much superior to the one first published. The fruits of many years of experience as a teacher are given to the law student, and here he will

find what is first needed to give him a proper foundation for future legal studies.

The Formal Bases of Law. By Giorgio Del Vecchio, Professor of Philosophy of Law in the University of Bologna. Boston Book Company, Boston. 1914.

The Modern Legal Philosophy Series is by this time well known to the readers of LAW NOTES, as many of the volumes contained therein have been noticed in this column. The present one is volume X. of the series. The author was born at Bologna in 1878, and has been teaching the philosophy of law in different Italian Universities since 1903. The translator is Mr. John Lesle of the Philadelphia Bar. The translation presented in this volume in three parts was published in Italian in three separate volumes: the first appearing in 1905, under the title of "The Philosophical Presuppositions of the Idea of Law"; the second, in 1906, under the title of "The Concept of Law"; the third, in 1908, under the title of "The Concept of Nature and the Principle of Law." "The Formal Bases of Law" has been chosen as the title for these combined volumes which form one connected work. There is an editorial preface by Joseph Drake, professor of law in the University of Michigan, and introductions by Sir John Macdonell, professor of Comparative Law in University College, London, and Shepard Barclay, former chief justice of the Supreme Court of Missouri.

The question whether there can be a philosophy of law, which has been doubted, has been answered by the author of the volume in the affirmative. Sir John Macdonell in his introduction says that those who in one form or other believe in the practicability of a philosophy of law fall into two groups, one the positive and the other vaguely described as idealist. The one would treat law as a fact to be examined, just as are the economic facts of society. The other would recognize the existence of the ethical element, the ineffaceable distinction between what ought to be and what is. The latter group may be subdivided into the Neo-Hegelian class, represented by Kohler, and the Neo-Kantian, to which belongs the author here translated. In constructing a philosophy of law the author does not ignore comparative law as a storehouse of experience, but insists that there must be in jurisprudence an element not derivable from experience based on the ethical need; the demand for something different from the mass of historical dissertations and investigations which, if they elucidate the past, too often serve to obscure present and future needs. When facts have been collected and arranged, when their common elements have been extracted, we are brought into the presence of a problem which experience cannot solve. It is not enough to know that such and such is commanded, such and such forbidden. We do and must ask, Why? We do and must endeavor to distinguish between the quality of certain commands and rules and that of others. The editors and publishers of the series of which Professor Del Vecchio's volume is a part deserve the support of the profession in their great work for the betterment of every day law through its speculative study.

News of the Profession.

THE LOUISIANA BAR ASSOCIATION will hold its next annual meeting at New Iberia, La., on May 7 and 8.

DISTRICT JUDGES MEET.—The eighth annual meeting of the district judges of Kansas was held at Topeka on January 26.

COUNTY ATTORNEYS IN CONVENTION.—The State Association of County Attorneys of Minnesota held its annual convention at St. Paul on January 23.

APPOINTED ATTORNEY GENERAL OF PENNSYLVANIA.—Francis Strunk Brown of Philadelphia has been appointed Attorney General of Pennsylvania by Governor Brumbaugh.

JUDGE APPOINTED MINISTER TO URUGUAY.—Circuit Judge Robert Emmett Jeffery of Newport, Ark., has been appointed by President Wilson to the post of minister to Uruguay.

UNITED STATES JUDGE DIES SUDDENLY.—James L. Martin, United States district judge for Vermont, died suddenly at a railway station at Montpelier, Vt., on January 14.

OREGON JUDGE NAMED.—George Noland of Klamath Falls has been appointed Judge of the Oregon Circuit Court to succeed Henry L. Benson, who has taken his seat on the Supreme Bench.

FORMER FEDERAL JUDGE DEAD.—Judge Louis Sulzbacher, former member of the Supreme Court of Porto Rico and former United States Judge for the Indian Territory, died in New York on January 17.

NEW SOUTH CAROLINA JUDGE.—Mendel L. Smith of Camden has been elected judge of the Fifth Circuit by the South Carolina joint assembly. He succeeds the late Judge Ernest Gary of Columbia.

NEBRASKA'S CHIEF JUSTICE DIES.—Chief Justice Conrad Hollenbeck of the Nebraska Supreme Court died at Lincoln, Neb., on January 21, of heart disease. He had been in office but two weeks.

THE NEW MEXICO BAR ASSOCIATION held a special meeting at Santa Fe on January 26 to discuss proposed legislation and a necessary revision of the laws of the state. President M. E. Hickey of Albuquerque presided.

ELECTED DEAN OF LAW SCHOOL.—Prof. Samuel P. Axline, former dean of the law school of Ohio Northern University, and now a Toledo attorney, has been chosen dean of the Municipal College of Law of Toledo University.

AMERICAN BAR ASSOCIATION.—The executive committee of the American Bar Association has selected Salt Lake City, Utah, as the meeting place for the 1915 annual convention, which will be in session on August 17, 18 and 19.

APPOINTED TO REVISE ORDINANCES.—Hugh K. Wagner of St. Louis, Mo., has been appointed by Mayor Kiel to revise the ordinances of that city under a recently enacted measure providing therefor. It is anticipated that the work will require about a year.

NAMED CHANCELLOR.—Governor Rye of Tennessee has appointed James B. Newman, a prominent Nashville lawyer, as judge of the second chancery court of Davidson county. The office was created by a recent act of the Tennessee legislature.

TAKES LAW CHAIR.—Henry Sherman Boutell, former American minister to Switzerland, has accepted the chair of constitutional law in Georgetown University, Washington D. C., succeeding Chief Justice Seth Shepard of the District Court of Appeals.

OHIO LAWYERS GET STATE APPOINTMENTS.—Governor Willis of Ohio has appointed Beecher W. Waltermire, a Findlay attorney, a member of the state public utilities commission. Another lawyer, James B. Ruhl of Cleveland, has been appointed State Superintendent of Insurance.

HEADS LAW SCHOOL ASSOCIATION.—Harry S. Richards, dean of the University of Wisconsin law school, and former dean of the University of Iowa Law school, was elected president of the American Association of Law Schools at a recent meeting of the association at Chicago.

DEATH OF ILLINOIS JUDGE.—Judge Alonzo K. Vickers of the Illinois Supreme Court, died at East St. Louis, Ill., on January

21, after a brief illness. Judge Vickers was sixty-two years of age and had been a circuit judge for fifteen years and a member of the Supreme bench for nine years.

ELEVATED TO MASSACHUSETTS SUPREME BENCH.—Judge James B. Carroll of Springfield, who was appointed to the Bench of the Massachusetts Superior Court only a few weeks ago, has been promoted to the Supreme Judicial Court of that state to succeed Justice Henry N. Sheldon, retired.

RESIGNS CITY COURT JUDGESHIP.—Judge J. A. Johns of Winder, Ga., has tendered his resignation as judge of the city court of Jefferson, Jackson county. The creation of the new county of Barrow took that portion of Winder in which Judge Johns resided out of Jackson county.

APPOINTED TO BENCH IN FLORIDA.—Edward C. Love of Quincy, United States district attorney since May, 1913, has been appointed by Governor Trammell to be judge of the circuit court for the second judicial circuit of the State of Florida, to succeed the late Judge John W. Malone.

THE ASSOCIATION OF PROBATE JUDGES OF MINNESOTA elected the following officers at the annual convention held recently at St. Paul: President—Judge E. A. Lewis of Todd county; vice-president—Judge S. W. Gilpin of St. Louis county; secretary and treasurer—Judge A. L. Stenger of Stevens county.

THE ASSOCIATION OF PROBATE JUDGES OF OHIO met in annual convention at Columbus recently and elected the following officers: President—Judge William H. Lueders, Cincinnati; vice-president—Judge H. C. Smith, Zanesville; secretary—Judge C. M. Bowers, Kenton; treasurer—Judge E. A. Brown, Circleville.

MINNESOTA JUDICIAL APPOINTMENTS.—William C. Hughes has been appointed municipal judge of Mankato, Minn., succeeding Arthur Comstock, who was elevated to the District Bench. Neil McInnis has been named as special municipal judge for Eveleth, to fill the vacancy caused by the death of Thomas Carey.

FEDERAL JUDGE RETIRES.—Judge Olin Wellborn, who has presided in the United States court for the southern district of California for twenty years, resigned recently, under the law granting judges retirement after the age of seventy. Judge Wellborn is now seventy-two. He was appointed to the bench by President Cleveland in 1895.

NAMED CIRCUIT JUDGE IN ARKANSAS.—Marcellus L. Davis of Dardanelle has been appointed judge of the Fifth judicial circuit by Governor Hays of Arkansas to fill the vacancy caused by the death of Judge Jesse M. Martin of Russellville. The circuit is composed of the counties of Yell, Conway, Pope and Johnson.

THE IDAHO STATE BAR ASSOCIATION at its recent annual convention elected the following officers: President—Karl Paine of Boise; secretary—Ben S. Crow of Boise; treasurer—P. E. Cavaney of Boise; county vice-presidents—Frank B. Kinyon, Ada; W. P. Briggs, Adams; W. A. Broadhead, Blaine; W. L. Stafford, Gooding.

CHANGES AMONG FEDERAL ATTORNEYS.—Colonel William J. Youngs, for more than twelve years United States Attorney for the Eastern District of New York, resigned from office on January 25. U. G. Denman of Cleveland, United States attorney for the Northern District of Ohio, resigned on February 15, and Edwin S. Wertz of Wooster was appointed to succeed him.

THE DISTRICT OF COLUMBIA BAR ASSOCIATION has elected the following officers: President—William M. Lewin; first vice-president—William Henry Dennis; second vice-president—H. Prescott Gatley; secretary—Edwin L. Wilson; treasurer—W. W. Millan; board of directors—United States Attorney John E. Laskey, Leon Tabriner and Stanton C. Peelle.

THE CONNECTICUT STATE BAR ASSOCIATION held its annual meeting at Hartford, Conn., on January 25. President Charles Phelps of Rockville was in the chair. Edward A. Harriman read a paper on "Efficiency in the Administration of Justice." At the banquet, speeches by Samuel J. Elder of Boston, president of the Massachusetts Bar Association; Judge William S. Chase, and former President William H. Taft, were on the program.

CLEVELAND BAR ASSOCIATION MEETING.—At the regular monthly luncheon of the Cleveland Bar Association on January 2, Mr. Albert S. Osborn, handwriting expert of New York, author of "Questioned Documents," delivered an address on the subject of "A Disputed Document in Court." Hon. John N. Van Deman, president of the State Bar Association of Ohio, was the guest of the association for the day.

CHANGES IN TEXAS JUDICIARY.—Judge T. S. Reese, for eight years associate justice of the Texas Court of Civil Appeals, first supreme judicial district, at Galveston, resigned from the bench on February 1. C. E. Lane of La Grange was appointed to fill the vacancy.—District Judge Clarence Martin of Fredericksburg has resigned and N. T. Stubbs of Johnson City has been appointed to succeed him.—Edwin J. Clark of Waco has been appointed Judge of the new Seventy-fourth District Court, recently established in McLennan county.

ARIZONA STATE BAR ASSOCIATION.—The annual meeting of the Arizona State Bar Association was held at Phœnix, Ariz., on January 12. The president's address was delivered by H. B. Wilkinson. Officers for the ensuing year were elected as follows: President—P. W. O'Sullivan, Yavapai county; vice-president—J. L. B. Alexander, Maricopa county; secretary—J. E. Nelson, Maricopa county; treasurer—John Mason Ross, Cochise county; directors—Frank O. Smith, Yavapai county; A. G. McAllister, Graham county; M. J. Dougherty, Maricopa county.

FEDERAL JUDGE MCPHERSON DEAD.—Judge Smith McPherson of the United States District Court, Southern District of Ohio, died at Red Oak, Ia., on January 17. He was born near Mooresville, Ind., in 1848, and graduated from the University of Iowa in 1870. He practiced law in Red Oak from 1870 to 1900. He was appointed district attorney for the third judicial district of Iowa in 1874 and served in that position until 1880. In 1881 he was elected attorney general of Iowa, serving until 1885. He was elected to Congress in 1899 from the ninth district, but resigned June 6, 1900, having been appointed judge of the federal court, and took up his duties the following day. His extensive and varied legal training, with his natural judicial temperament, gave him an experience which made him an excellent presiding officer in the federal court.

SOUTH CAROLINA BAR ASSOCIATION.—At the annual meeting of the South Carolina Bar Association held at Columbia, S. Car., on January 21 and 22, the President's address was delivered by F. Barron Grier of Greenwood. Other addresses were as follows: "Formulas and Creeds in Law and Religion," by United States Circuit Judge Charles A. Woods of Marion, S. Car.; "The Reasonable Efficiency of our Courts," by Circuit Judge R. Withers Memminger of Charleston, S. Car.; and "The Law," by Charles A. Douglas of Washington, D. C. The following are the newly elected officers: President—John Lyles Glenn, Chester; secretary—W. C. McGowan, Columbia; treasurer—John T. Sloan, Jr., Columbia; vice-presidents—First circuit, B. H. Moss, Orangeburg; Second circuit, R. P. Searson, Jr., Allendale; Third circuit, Charlton Durant, Manning; Fourth circuit, E. O. Woods, Darlington; Fifth circuit, W. H. Cobb, Columbia; Sixth circuit, Thomas F. McDow, Yorkville; Seventh circuit, C. C. Wyche,

Spartanburg; Eighth circuit, Wm. N. Graydon, Abbeville; Ninth circuit, W. H. Fitzsimmons, Charleston; Tenth circuit, J. K. Hood, Anderson; Eleventh circuit, A. S. Tompkins, Edgefield; Twelfth circuit, L. D. Lide, Marion; Thirteenth circuit, J. J. McSwain, Greenville; executive committee—Julian Mitchell, Charleston, chairman; M. Rutledge Rivers, Charleston; R. B. Herbert, Columbia.

KANSAS STATE BAR ASSOCIATION.—The thirty-second annual meeting of the Kansas State Bar Association was held at Topeka, Kansas, on January 27 and 28, 1915. The President's address was delivered by Charles E. Lobdell of Great Bend, his subject being "Why be a Lawyer." Other addresses were as follows: "Some Recent Developments of the Law of Unfair Competition," the most meritorious of the papers of the Senior Class of Kansas University Law School, R. T. McCluggage, Wichita; "The Evil of a Multiplication of Courts," C. E. Cory, Ft. Scott; "Justice Judicially Administered," J. O. Rankin, Paola; "The New Federal Anti-Trust Legislation," T. M. Lillard, Topeka; "The Voice from the Dead," I. M. Mahin, Smith Center; "The Passing of Reaction," Chester I. Long, Wichita; "The Lawyer," Miss Nellie Cline, Larned; and the annual address by Hon. Harry Olson, Chief Justice of the Municipal Court of Chicago, on the topic, "The Administration of Justice in a Modern City." The meeting was one of the most successful and best attended in the history of the Association. The following officers were elected for the ensuing year: President—Charles L. Kagey, Beloit; vice-president—Charles Blood Smith, Topeka; secretary—D. A. Valentine, Topeka; treasurer—J. G. Slonecker, Topeka; executive council—William Osmond, Great Bend, chairman; W. G. Holt, Kansas City; Thomas C. Wilson, Wichita; John C. Hogin, Belleville; A. S. Foulks, Ness City.

NEW YORK STATE BAR ASSOCIATION.—As announced in the last issue of LAW NOTES, the thirty-eighth annual meeting of the New York State Bar Association was held at Buffalo, N. Y., on January 22 and 23. Alton B. Parker delivered the president's address. The annual address was given by former President William H. Taft, his subject being "State Constitutions." Other addresses were as follow: "The Making of Constitutions," by ex-Judge Morgan J. O'Brien of New York; "Legal Theories and Social Science," by Norris R. Cohen, professor of philosophy in the College of the City of New York; "Uniformity in the Legislation of the Different States," by Carlos C. Alden, dean of the Buffalo Law School. The topic of general discussion at the meeting was "Should the Executive and Judiciary Articles of the Constitution Be Revised, and if So, How?" At the annual banquet, Judge Alton B. Parker acted as toastmaster, and the following speakers were heard in response to toasts: Judge William H. Cuddeback of the Court of Appeals; Supreme Court Justice Herbert P. Bissell of Buffalo; Patrick Francis Murphy, Morgan J. O'Brien and Job E. Hedges, of New York city; Dr. John H. Finley of Albany, Commissioner of Education; and E. F. B. Johnston, K. C., of Toronto, provisional vice-president of the Canadian Bar Association. Officers for the ensuing year were elected as follows: President—Alphonse T. Clearwater, Kingston; vice-presidents—First district, Eugene D. Hawkins; second district, Edgar M. Cullen; third district, Thomas E. Finegan; fourth district, Thomas Spratt; fifth district, Ernest T. Edgecomb; sixth district, Rollin W. Meeker; seventh district, Thomas Raines; eighth district, Daniel J. Kenefick; ninth district, J. Mayhew Wainwright; secretary—Frederick E. Wadhams, Albany; treasurer—Albert Hessberg, Albany. The association adjourned to meet at Albany on the last Friday in March to hear and act on proposals to be laid before the constitutional convention.

OTHER DEATHS.—In addition to those heretofore mentioned, the deaths of the following illustrious members of the profession have been noted: January 3, at Birmingham, Ala., Samuel E. Greene, judge of the Criminal Court of Jefferson county, Alabama; January 3, at Cartersville, Ga., Thomas W. Milner, aged 68, former judge of the Georgia Circuit Court; January 3, at Huntsville, Ala., Daniel W. Speake, judge of the Eighth Judicial Circuit of Alabama; January 16, at Decatur, Ill., W. E. Nelson, aged 90, formerly Circuit Judge of the Fourth Judicial District of Illinois; January 17, at Los Gatos, Cal., William N. Landers, United States attorney for Porto Rico and formerly assistant United States district attorney at Nome, Alaska; January 18, at Vallejo, Cal., A. J. Buckles, aged 69, judge of the California Superior Court; January 20, at Grand Rapids, Mich., W. J. Stuart, aged 70, judge of the Michigan Superior Court; January 22, at Mineral Wells, Tex., Jesse M. Martin, aged 37, judge of the Fifth judicial circuit of Arkansas; January 23, at Philadelphia, Pa., John Lippincott Kinsey, aged 68, judge of the Philadelphia Common Pleas Court; January 24, at Quincy, Fla., John W. Malone, aged 73, judge of the Second judicial circuit of Florida for the past twenty-three years; January 25, at Springfield, Ohio, James P. Goodwin, aged 58, formerly judge of the probate court of Clark county, Ohio; January 27, at Charleston, W. Va., Judge Howard N. Ogden, aged 51, member of the West Virginia Public Service Commission; January 30, at Brownsville, Tenn., Henry J. Livingston, aged 81, for twenty-one years Chancellor of the Tenth chancery division of Tennessee; February 1, at Coshocton, Ohio, William R. Gault, aged 68, former probate judge of Coshocton county, Ohio; February 1, at Fresno, Cal., General John Ramsey Kittrell, aged 86, formerly attorney general of the state of Nevada; February 1, at Cincinnati, Ohio, Frank O. Loveland, aged 53, Clerk of the United States Circuit Court of Appeals at Cincinnati and author of "Loveland on Bankruptcy;" February 1, at Portland, Ore., E. B. Watson, aged 70, former Judge of the Oregon Supreme Court; February 3, at Angola, Ind., Frank M. Powers, aged 55, judge of the Indiana Appellate Court since January 1 of this year; February 6, at Chicago, Ill., Oliver Harvey Horton, aged 79, formerly Chief Justice of the Circuit Court of Cook county, Illinois; February 10, at Tokio, Nicholas Williams McIvor, aged 55, formerly United States consul general and judge of the United States Circuit Court at Yokohama.

English Notes.

THE WAR AND CRIME.—It is a curious fact that since the outbreak of war there has been a large diminution in crime throughout the whole of England, and this is particularly noticeable so far as indictable crime is concerned. Not only in the metropolis, but from assizes and quarter sessions, reports continue to arrive in which the presiding judges and chairmen congratulate grand juries on the lightness of the calendar. This fact is satisfactory in the highest degree, and is, indeed, eloquent of the spirit that permeates the country at large.

DEATH OF LORD JUSTICE KENNEDY.—Lord Justice Kennedy died suddenly on January 17, from an attack of angina pectoris. He was the eldest son of the Rev. William James Kennedy, vicar of Barnwood, and was born in 1846. He was educated at Eton and afterwards won a foundation scholarship at King's. After winning the Craven and Bell scholarships and the Powis medal, he was Senior Classic in 1868. Later he was elected to a Fellow-

ship at Pembroke. In 1870-71 he was Mr. Goschen's private secretary at the old Poor Law Board, and was called to the Bar by Lincoln's-inn in January, 1871, joining the Northern Circuit. He took silk in 1885. In 1892, on the resignation of Mr. Justice Denman, he was appointed a judge of the Queen's Bench Division, and was the only judge of the High Court nominated by Lord Herschell during his second Chancellorship. He presided at the trial of Allen *v.* Flood, and decided the case of Re Ashby's Staines Brewery Company, commonly known as the "Kennedy" judgment. On the promotion of the late Lord Collins to the House of Lords and of Lord Cozens-Hardy to the Mastership of the Rolls, in 1907, Mr. Justice Kennedy was appointed Lord Justice.

ANECDOTE OF JUDGE WEBB.—The Recollections of an Irish Judge, by Judge Bodkin, K. C., recently published, has been much discussed and reviewed. All the anecdotes told in it are not new, but some of them are unquestionably authentic. One of the latter is the late Judge Webb's famous application for a publican's license for Peter Mulligan before the Recorder of Dublin. "He is a very young man for so responsible a position," said the recorder. Dr. Webb replied: "My Lord, Alexander the Great at twenty-two years of age had—had crushed the Illyrians, and razed the city of Thebes to the ground; had crossed the Hellespont at the head of his army; had conquered Darius with a force of a million in the defiles of Issus, and brought the great Persian Empire under his sway. At twenty-three René Descartes evolved a new system of philosophy. At twenty-four Pitt was Prime Minister of the British Empire on whose dominions the sun never sets. At twenty-four Napoleon overthrew the enemies of the Republic, and is it now to be judicially decided that at twenty-five my client, Peter Mulligan, is too young to manage a public-house in Capel street?" The application was at once granted.

SIR HENRY NEWBOLT.—In the long list of New Year honors, none has created more general satisfaction than the knighthood conferred on Mr. Henry Newbolt. Although most widely known by his contributions to literature, notably by his stirring ballads of naval daring—verses which were first collected under the title of "Admirals All," obtained a recognition not often accorded to the work of a young poet—Sir Henry, like so many others who have achieved fame in letters, can be claimed as a member of the Legal Profession. Called to the Bar at Lincoln's-inn in 1887, he devoted some years to legal work. For a time he was connected with the short-lived series of law reports known as "The Reports," and he also took part in the preparation of the Digest of English Case Law which was published in 1898 by Messrs. Sweet and Maxwell and Messrs. Stevens and Sons. But literature proved more alluring than the practice of the law, and Sir Henry has for some years devoted himself almost exclusively to the work which has won for him an ever-widening circle of admirers. It may be added that Sir Henry married a granddaughter of Lord Chancellor Campbell.

DEATH ON THE EVE OF PROMOTION.—The appointment of the late Mr. Percy Illingworth, the Chief Government Whip, to a Privy Councilorship on January 1, followed in such tragic fashion by his death before he had been sworn a member of the Privy Council, will recall some pathetic instances in legal biography in which death has intervened to stop the completion of promotions and honors. Sir John Davis, who had been Irish Attorney-General and Speaker of the Irish House of Commons, was a serjeant-at-law both in England and Ireland, and had a brilliant forensic and political career in both countries, was in 1626 appointed Lord Chief Justice of England. He died suddenly from an apoplectic attack before he had taken his seat on the Bench. Sir Dudley Ryder, the Lord Chief Justice of the Court of King's Bench, was the recipient of a royal letter, signed by the King on May 24, 1756, for his elevation to the peerage, but he died the day before the completion of the patent. Charles Yorke, the second son of Lord Chancellor Hardwicke, was appointed Lord Chancellor in January, 1770, when he suddenly died at the moment when a patent conferring a peerage on him was in progress of completion. In July, 1907, Mr. Alfred Billson, M. P., an eminent solicitor, to whom Mr. Birrell had been articled before he had chosen the Bar for his profession, had been nominated a Knight Bachelor, but died suddenly in the House of Commons before he had received the accolade.

SCOTTISH LEGAL NOMENCLATURE.—The statement in an advertisement of a new Scots Digest that "the rubrics will be taken from those of the Session Cases" brings into prominence one of the many differences in professional terminology connected with reports prevailing in Scotland and England. Where an English barrister speaks of the headnote of a case the Scots advocate refers to the rubric—a reminiscence of the old days when certain portions of the state documents were, and as the directions for the conduct of Divine service in the Book of Common Prayer still are in many cases, printed in red. A glance through the Scots reports dicloses other points of difference in nomenclature. Thus, a Scots court, when it takes time to consider its judgment, "makes avizandum"—corresponding to our *curia advisari vult;* when the case is set down for judgment it is said to be for "advising;" and the formal order which is pronounced is termed an "interlocutor." It is curious, by the way, that in England the terms employed in connection with considered judgments are not uniform in all the courts. When the Court of Appeal or a judge of the High Court proposes to give a considered judgment, the case is put in the cause list "for judgment," whereas in the House of Lords it is put down for "consideration"—a term which in the High Court implies that further argument is desired. Many of the other differences in legal nomenclature in use in Scotland and England respectively have been amusingly collected by John Hill Burton in his Book Hunter, where he says: "When one has been at work among interlocutors, suspensions, tacks, wadsets, multipoindings, adjudications in implement, assignations, infeftments, homologations, charges of horning, quadriennium utiles, vitious intromissions, decrees of putting to silence, conjoint actions of declaration and reduction-improbation—the brain, being saturated with these and their kindred, becomes refreshed by crossing the border of legal nomenclature, and getting among common recoveries, demurrers, quare impedits, tails male, tails female, docked tails, latitats, avowrys, nihil dicits, cestuis que trust, estoppels, essoigns, darrein presentments, imparlances mandamuses, qui tams, capias ad satisfaciendum or ad witheram and so forth." As a member of the Scots bar, Burton enjoyed contrasting the terms with which he was most familiar with those in use in England and indulging in a little pleasantry over the practice of the old English lawyers in treating of the relationship of husband and wife under the heading "Baron and Feme." The tendency in more recent times, however, has been to get rid of great many of the more obscure terms which were apt to repel the educated layman from even opening a law book.

"CASUAL" WORKMAN'S "AVERAGE WEEKLY EARNINGS."—One of the obviously essential features of the employment of a workman which is of a "casual nature," within the meaning of the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), is that he should be engaged to work for several different employers, if his labor is to be of any substantially productive value to him. He can scarcely be employed by one person or firm only, and

yet, in the ordinary course of events, succeed in earning a living wage out of his employment. Consequently, the decision of the Court of Appeal in the recent case of Cue *v.* Port of London Authority (111 L. T. Rep. 736) cannot fail to have a very far-reaching application. It is fortunate, therefore, that the court have seen their way to spell out of the bewildering provisions of section 2 of the first schedule to that Act an intelligible rule for computing the "average weekly earnings" of such a workman as the basis on which to assess the compensation payable to him when he has been injured by "accident arising out of and in the course of his employment." And this, despite the criticism of the Master of the Rolls (Lord Cozens-Hardy) regarding that "strange piece of drafting," as his Lordship did not forbear to style it. "A word of commendation uttered by anybody" was lacking when the section was being pondered; as, indeed, it is at all times when the statutory schedules come before the courts for consideration. No meed of praise could ever then be aptly bestowed. Starting with the postulate stated in the headnote of the report, that "it is inconsistent with the nature of casual employment that a workman employed therein should be employed under 'concurrent contracts of service,'" a preliminary difficulty that would otherwise have presented itself was forthwith disposed of. The learned County Court judge had permitted himself to fall into the error of complicating the problem to which the case gave rise by treating the various casual employments of the deceased workman as contracts of that description. And small wonder that His Honor did so, seeing how intricate are the terms of the enactment. But when once that cause of perplexity was removed there was less occasion for dubiosity. It is readily apparent how inappropriate the doctrine of "concurrent contracts of service" is to several employments of a casual nature from what was laid down by the learned judges of the Court of Appeal. In fine, any contention in support of the award on that footing was forced to be abandoned in the argument on behalf of the dependents of the deceased workman. And the rule that was ultimately held to be the true one—after a searching study of the language, obscure though it be, of the section—was formulated in the way that the headnote to the report succinctly expresses. In thus elucidating a question of novelty that must nevertheless be of common occurrence, the Court of Appeal have furnished the County Courts with an invaluable guide in the decision of all future cases of a similar character.

THE "DACIA."—The sale of the *Dacia,* a German liner which has been at Port Arthur (Texas) since July last, a few days before the outbreak of the war, and has not, owing to the certainty of capture by some British warship, ventured to put out to sea, is likely to raise some difficult and delicate problems of international law. The *Dacia* has been sold, it is alleged, at half her market value to an American citizen of German extraction and is being loaded with cotton, and under a changed name —the *Margaret*—is about to sail for Rotterdam. The *Dacia* has been given American registry by the Department of Commerce, but refused insurance by the Treasury Department of the United States. Will the British government recognize as valid under these circumstances the transfer of the *Dacia* from the German to the American flag, carrying a cargo which, though not on the contraband list, must be regarded as having Germany for its ultimate destination? The doctrine with reference to the buying and selling of merchant vessels in time of war, which differs widely from that of the sale of belligerent vessels in neutral ports, is thus enunciated by the Hon. J. Hannis Taylor, the late Minister Plenipotentiary of the United States to Spain: "After a declaration of war, according to English and American practice, a neutral citizen may buy a merchant vessel of a belligerent, provided the sale is absolute. A conditional sale, as with right of repurchase, is not considered bona fide. Many purchases of American ships were made by British subjects during the careers of the Confederate cruisers, and like purchases were made of Chinese ships by Americans during the Franco-Chinese War." The question as to whether the transfer of the *Dacia* was, under the circumstances, bona fide, will, it may be safely said, be eventually decided by the British Prize Court. The fact that, while one department of the United States Government assents to the transfer, another department has refused to grant insurance owing to an excessive risk is a clear indication that the transaction is not likely to be regarded as valid without a very full investigation by a British Prize Court in the event of the *Dacia* coming within its jurisdiction by capture on the high seas. The gravity of the question to be decided has been thus tersely enunciated in the columns of the lay press: "If the *Dacia* can be turned into an American ship in this way and allowed to trade directly or indirectly with Germany, a similar transfer may be made of all the German ships at present in American ports. And this would be to deprive us of one of the advantages of sea power to which we believe we are legitimately entitled." A letter from Earl Russell to Mr. Adams, the American Ambassador, on the 10th April, 1863, though written with reference to the sale of a belligerent warship, the *Sumter,* in a neutral port—Gibraltar—by public auction, seems to apply to the case of the *Dacia:* "The neutral and belligerent have distinct rights in the matter; the neutral has the right to acquire such property offered to him for purchase, but the belligerent may in the particular circumstances of the case not recognize the transfer of the property as being that of his enemy only parted with to the neutral in order to protect it from capture on the high seas. The Prize Court of the belligerent, when property so circumstanced is brought before it, declares whether the transfer is fair or fraudulent."—*Law Times.*

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Obiter Dicta.

A QUARREL AMONG THE GIANTS.—Mathewson *v.* Burns, 50 Can. Sup. Ct. 115.

OF COURSE.—Drainage District *v.* Boggs, 262 Ill. 338.

EQUALLY OF COURSE.—In Billings Sugar Co. *v.* Fish, 40 Mont. 256, Fish objected to the drainage of a lake.

A LOSER.—The plaintiff in error in Winner *v.* Linton, 120 Md. 270, lost his case.

GEN. I. 2.—"The municipal law of the state was without form and much of it was void."—Per Schauck, C. J., in State *v.* Lynch, 88 Ohio St. 91.

GOT WHAT HE WAS AFTER.—It appears from Starks *v.* State, 38 Tex. Crim. 233, that the plaintiff in error was convicted of breaking into jail. His sentence was two years in the penitentiary.

AN EXPERT OPINION.—The sole question raised in Holcomb *v.* Van Zylen, 174 Mich. 274, was whether a turkey is an animal. The decision of the court, in the affirmative, will be generally accepted as good law, since Judge Bird wrote the opinion.

TRUTH WILL PREVAIL.—Though convicted in the trial court of selling liquor without a license, the defendant in Ernest Treuth *v.* State, 120 Md. 257, did not give up but fought so earnestly for freedom that the appellate court reversed the conviction.

THE LONGEST LAW FIRM NAME.—Titles of law firms containing four individual names are not unusual. Our attention, however, has recently been directed to the firm of "Greene, Fairchild, North, Parker & McGillan" of Green Bay, Wisconsin. Can any of our readers inform us of a firm name that beats or even equals it in the matter of length?

A WORD OF ADVICE.—"Unfortunately some directors appear to think that they have fully discharged their duties by acting as figureheads and dummies; but this is a mistake, and a delusion from which some of them are now and then awakened by a judgment for damages arising from allowing the corporation to be looted while they sat negligently by and looked wise." Per Lumpkin, J., in McEwen *v.* Kelly, 140 Ga. 724.

PROSECUTIONS IN MISSISSIPPI.—Volume 102 of the Mississippi Reports contains the records of a number of criminal prosecutions from which we glean the following facts: B. Ware brandished a deadly weapon (p. 634); Saucier was a little bolder and uttered a forged instrument (p. 647); and to cap the climax, one of the Gentry of the commonwealth broke into a freight house and was convicted of burglary (p. 630).

UPHOLDING THE FEDERAL CONSTITUTION.—The Washington Supreme Court said in a recent case (Becker *v.* Clark, 40 Wash. Dec. 503): "This court has steadfastly adhered to the view that a lie is not a legal tender in this state." It is apparent that the Washington court is inclined to strict construction. The Federal constitution declares that "no state shall . . . make anything but gold and silver coin a legal tender in payment of debts," which provision the court refuses to construe as including silver tongues.

MISSOURI CASES.—We are indebted to a correspondent for a copy of a recent day calendar of the St. Louis (Mo.) Circuit Court. Division No. 2 contained a case styled Gold *v.* Silver, the nature of the action being left to the imagination. Division No. 1, which, by the way, was presided over by Judge Grimm, contained two divorce cases under the titles Hell *v.* Hell, and Sinn *v.* Sinn. Our correspondent advises us that in the case last named, the wages of Sinn were divided and given in part to the wife.

CORPORATIONS AND INDIVIDUALS.—That an individual usually has all the best of it in litigation with a corporation is not apparently a recent idea. In Louisville, etc., R. Co. *v.* Patterson, 69 Miss. 91, decided twenty-five years ago, the court, affirming a judgment for damages against the railroad, said: "That a jury awarded the trivial sum complained of is proof positive that no undue prejudice existed against the corporation. Let the company thank God and take courage."

TIPSY LEGISLATION.—"Men have been getting drunk ever since Noah celebrated the subsidence of the flood. The ancient Germans, from whom the Anglo-Saxon race sprung, used to propose their laws in their legislature while drunk and consider their passage while sober. And it is suspected by some that their descendants propose laws in legislatures of the present day while in the same condition, though their enactment may not be considered while sober, as by their ancestors." Per Neil, J., in Texarkana, etc., R. Co. *v.* Frugia, 43 Tex. Civ. App. 53.

SHOE REPARTEE.—Mr. Justice Magee, of the High Court of Ontario, was hearing an appeal against the conviction of a seventy-year-old man on a charge of nonsupport by his wife, who was ten years younger. "What is the occupation of the appellant?" asked the judge of Mr. T. J. W. O'Connor, who was supporting the appeal. "He is a cobbler, your lordship," answered the lawyer. "The lady is his second wife." "Ah, then she is his last, but he refused to stick to her," remarked the learned justice. "Yes, and your lordship is the sole hope of the broken pair," was Mr. O'Connor's rejoinder.—*Legal Laughs.*

CHRONIC KICKERS.—It seems that chronic kickers really are entitled, contrary to common belief, to the thanks of the public generally. A Canadian judge has given them their due in this manner: "Much of our law has been made by those insistent upon their rights in trivial matters, and much of the improvement in public conveniences of all kinds, including railways, steamboats, and hotels is due to those who will not submit to be fobbed off with less than they are entitled to. Such perform a public service of no little value, and are no less entitled to the thanks of the general public because they are usually called by a somewhat less dignified appellation than that of Sir William Jones, or because it is seldom that a distinguishing characteristic of their manners is 'sweetness and light.' I confess to a secret admiration for such, and would wish that there were a more common uprising against bad air, bad water, poor food, and poor accommodation generally." Per Riddell, J., in Brazeau *v.* Canadian Pacific R. Co., 11 Ont. Weekly Rep. 138.

DIDN'T LIKE THE SYSTEM.—A firm of attorneys in Oklahoma run their collection department under the name of the Credit Reference Company. In answer to a claim notice recently sent therefrom, the following letter was received, and has been forwarded to us with the statement that it is "too good to hide away in the archives of our files:"

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Credit Reference Co,
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Jentlemen you do do an roung by Judge to colect by Black Maile the credid of many an honest Poore man when you have so many Black Sheep in the supporte of the foldes of your agence who do give unjust measure to gaine a big Proffit the Laws of our State and Goverment is good enough with out your sistem

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Law Notes

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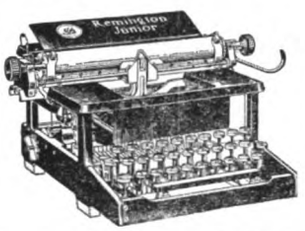

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